STATE OF MINNESOTA DISTRICT COURT
COUNTY OF RAMSEY SECOND JUDICIAL DISTRICT

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The State of Minnesota,
by Hubert H. Humphrey, III,
its attorney general,
and
Blue Cross and Blue Shield
of Minnesota,
Plaintiffs,
vs. File No. C1-94-8565
Philip Morris Incorporated, R.J.
Reynolds Tobacco Company, Brown
& Williamson Tobacco Corporation,
B.A.T. Industries P.L.C., Lorillard
Tobacco Company, The American
Tobacco Company, Liggett Group, Inc.,
The Council for Tobacco Research-U.S.A.,
Inc., and The Tobacco Institute, Inc.,
Defendants.

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TRANSCRIPT OF PROCEEDINGS
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P R O C E E D I N G S

(In-chambers conference as follows:)

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(In-chambers conference concluded.)

THE CLERK: All rise. Ramsey County District Court is again in session, the Honorable Kenneth J. Fitzpatrick now presiding.
(Jury enters the courtroom.)
THE CLERK: Please be seated.
THE COURT: Good morning.
(Collective "Good morning.")
THE COURT: Counsel.

PAUL J. MUCH

called as a witness, being previouslay sworn, was examined and testified as follows:

CROSS-EXAMINATION (cont'd)

BY MR. BERNICK:
Q. Good morning, Mr. Much.
A. Good morning.
MR. BERNICK: Good morning, ladies and gentlemen.
(Collective "Good morning.")
Q. Mr. Much, I want to continue on with the pack analysis that we started yesterday but now turn to a different chapter of the pack analysis, so we got a new pack for a new chapter. Okay? And we'll continue on with the analysis that we started yesterday.

If you could direct your attention back to the spreadsheet that we were working with, which is in your tab 12, Exhibit 24308, I'm going to put it back up on the screen here if I can. Are you with me?
A. Yes.
Q. And yesterday we talked about, beginning with the retail price per pack -- which again for 1994, the average retail price I think here in Minnesota was two dollars and two cents; correct?
A. That is correct.
Q. Okay. And if we want to out of this pack determine what the tobacco companies' revenues were; that is, how much the tobacco companies got out of this pack based upon your analysis, would we look down to number six on the chart, which is the assumed

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wholesale margin?
A. Yes, we would have to use the assumed wholesale margin.
Q. Okay. And if we go over now to that portion which is 1994 and blow that up big, is it true that the assumed wholesale margin that you used in your analysis for 1994 was 50 percent?
A. Yes.
Q. Okay. And 50 percent of two dollars and two cents would be a dollar one; right?

A. Yes.
Q. Okay. And again, based upon two dollars and two cents and an assumed wholesale margin of 50 percent, this would be a revenue figure for the manufacturers; right?
A. Well keep in mind that we asked the tobacco companies for information on sales and profits for these years within the state of Minnesota; they did not provide such information. What we found in the documents that were available was some information on the wholesale margin, the difference between manufacturer sales and retail sales.
And in fact, for the information provided for those years, it was actually higher than 50 percent. In the years '80 through '89 it was some -- on average about 57 percent industry-wide, based upon a document we received from Philip Morris for those years. For the year 1994, they did not provide such -- the tobacco companies did not provide such information as they did for the rest of the years, and so we used a lower, 50 percent, margin for this analysis.
Q. Going back to my question, my question was: Based upon two dollars and two cents as the retail figure and the assumed margin at 50 percent which

you've used in your analysis, would the dollar one represent, according to this analysis, the manufacturer's revenue?
A. Based upon a lower wholesale margin of 50 percent, that would be correct.
Q. Okay. And just so we're clear, manufacturer's revenues is another way of talking about, you know, in a sense, the sales figure for the manufacturer?
A. That is correct.
Q. Okay. Now you went further in your analysis in order to find out what the operating income or operating profit would be; did you not?
A. In our analysis, yes, we worked all the way down through operating profit by company, based upon the information available from the own company's annual reports and filings with the Securities and Exchange Commission.
Q. And in the same spreadsheet, if we go down, we find that the operating profit margin which you used in your analysis here was about 25.2 percent.

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A. That's the margin that results when you go through all the individual companies in that particular year.

In looking at their individual profit margins for 1994, you will find that it aggregates about 25

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CROSS-EXAMINATION - PAUL F. MUCH
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percent, yes.

Q. Okay. Sometimes that's called -- I think you've talked about that as operating profit, sometimes in the reports as operating income; correct?

A. Those are generally the same, unless --

You'll find some companies may differentiate, but they'll footnote the differences usually. But those are the same.

Q. And the figure for 1994 was 25.2 percent; right?

A. Yes.

Q. Okay. Now just to give an illustration, I think as you've indicated, of where that number comes from, I'd like you to turn for a moment to Plaintiffs' Exhibit 173 -- excuse me, 17693, which is at your tab three.

A. All right.

Q. Is that the report for R. J. Reynolds for 1994?

A. This is for RJR Nabisco Holdings.

Q. Okay. And does that include the financial information for R. J. Reynolds Tobacco Company?

A. Yes.

Q. Okay. Was that a report, an annual report that you relied upon for purposes of your analysis in this case?

A. Yes, it was.

MR. BERNICK: Okay. We would offer that, Your Honor.

MS. WALBURN: No objection.

THE COURT: Court --

BY MR. BERNICK:

Q. If you -- I'm sorry.

THE COURT: Court will receive Exhibit 17693.

Q. If you return to the results of operations for nineteen ninety -- for that report for a moment, I would like to ask you some questions about the results of operations. Can you find that?

A. Are you referring to a specific page?

Q. I don't have the --

The copy that I have doesn't have a page number on it. It's what's up on the screen, although you can't read it all that well. The results of operations. I'm going to focus on 1994. Maybe I can get a better --

A. Okay. That's -- that would be in the segment analysis back in the footnotes.

Q. Okay.

A. In the lower portion of the page, I think you'll find a page number, number 31.

Q. Thirty-one, is that what it is?

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A. Is that -- is that the page you're -- I believe that's the one you're referring to.
Q. I think -- I think it is. It's got -- it's got the chart up there that contains this information.
A. That is page 31.
Q. Okay. Now if we go into that page, does that set out the results for operations, and particularly it breaks out the results of operations for RJRT? Woops. That's right here. And it compares them --
It's different for the results for tobacco international, as an example; correct?
A. Well this page identifies for the different business segments -- RJRT would be domestic, and tobacco international would be the rest of the world. Then you've got total tobacco.
Q. Okay.
A. And you're -- you're identifying, I think, the revenues.
Q. Right. Here's the revenues for Reynolds domestic tobacco; is that right?
A. That is correct.
Q. Okay. Now I didn't really kind of pick it up exactly right. The operating income is -- is down over here; right?
A. The operating income is below operating

contribution.
Q. Okay. And again I didn't pick up the whole thing, but the number is 1.1 billion; correct?
A. Yes.
Q. I can probably blow the screen up a little bit bigger.
But just so we're clear, in order to figure out what your operating income margin was, you went to the different annual reports for each year and you took the total sales figure for domestic tobacco, which in the case of Reynolds for 1994 would have been 4.5 billion dollars, and you compared to it the operating income, which in this case would be 1.1 billion dollars; would that be correct?
A. That would be correct.
Q. In this particular case the result of that comparison is about 24 percent; correct?
A. That's just about right.
Q. Okay. So after you take all of the results for all the companies using a similar analysis, you came up with an industry figure of about 25.2 percent for 1994. Fair statement?
A. Not quite. What you're doing is taking a composite -- you're not adding the percentages here. What we're doing is adding the actual numbers and

going company by company --

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Q. Fine.
A. -- in the analysis.
Q. So you would take all the four point fives, the equivalent thereto for all the companies, you'd take all the operating income figures, aggregate both, make a comparison, and end up with a percentage; correct?
A. Yes, year by year for each company.
Q. Okay. Now the question that I have for you is: Isn't it true that different companies contain or include in their sales figures different items?
A. Are you asking about tobacco only or are you asking about overall consolidated operations? Because what you'll find is that in the annual reports, you'll find some summaries for sales that contain everything, and then when you go back and look at the footnotes in the annual reports you'll see breakdowns, and they'll break it down like this, where they'll show RJRT, which is domestic tobacco, then they'll show tobacco international, then they'll show total tobacco, then they'll show food, but if you go to the front of the annual report you actually see some figures where all they identify is the total, which is 15 billion 366 million. So could you

give me some specificity to your question, and I'll try to answer.
Q. Yes. I'm asking whether different companies have different approaches in what they include in their sales figures for domestic tobacco? Did you look at that?
A. Sure. There may be some information that they may include or exclude. For example, there are some companies that in certain years will include cigarettes and they may include some other items in that, for example, some smaller operations related to tobacco, but what you'll find is that through time they generally aggregate tobacco together.
Q. Okay. Well if you take a look at the consolidated financial statements for this particular document, that is for RJR for 1994, can you go to the section that has got the summary of the accounting approaches taken for the consolidated financial statements.
A. Are you talking about the footnotes following the balance sheet?
Q. Yes.
A. Okay. I think that would start on page 48. Is that what you're referring to?
Q. Forty-eight. I'm actually looking at page 44.

A. Okay.
Q. And if we go down the right-hand column, does it deal with the accounting procedures that pertain to certain matters?
A. Yes.
Q. Okay. And I want you to take -- don't -- don't

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discuss it right now, but I want you to take a look at item four and bear that in mind for a second.

MR. BERNICK: Your Honor, may I approach the witness?

A. On which side of the page?

Q. This item right there.

A. Right.

Q. Don't say anything about it, but have you -- have you focus on that.

Is that item an item that is included or excluded from the sales figures for domestic tobacco for R. J. Reynolds?

MS. WALBURN: Objection to this question in view of the discussions earlier with the court.

MR. BERNICK: Just trying to establish a foundation for whether it's included or excluded.

THE COURT: You may answer it.

A. Your Honor, in order to answer it, I have to deal --

You asked me not to talk about it, and you've asked me a question premised on that. And the problem is, in your first question the premise is that it's related to tobacco, --

Q. Yes.

A. -- and that item -- that item does not say that it's related to tobacco. In fact, keep in mind that these companies sell things other than tobacco: food, other companies sell alcoholic beverages. What you'll find is that this particular item may be related to other operations, totally unrelated to tobacco, especially given the international nature of these companies.

Q. I understand that. Okay. It says that that particular item is excluded from net sales; does it not?

A. Yes.

Q. Okay. And if we go to take a look at the tobacco information that's up on the screen, that includes net sales for tobacco; does it not, up on the screen?

A. That particular item, not only do you have net sales for tobacco, you've got net sales for food, you've got total sales. And in keep in mind, that figure goes beyond the United States, that figure is

worldwide. So the --

Q. Could we focus --

A. So the figure --

The question you're asking me about on this particular item may relate to sales far beyond tobacco.

Q. Can we focus on my -- my question? My question is: Do we have net sales figures in this report relating specifically to domestic tobacco?

A. Within the total picture of the companies' total net sales, the answer is yes.

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Q. Did you make any determination, Mr. Much, as to whether this particular item, which according to these notes is excluded, would in fact include that figure for net sales; that is, whether the figure for net sales for domestic tobacco, whether it includes or excludes the item that we're referring to? Did you do that?
A. Two observations here.
Q. Can -- can we first get the question of whether you did it or not?
A. I'm -- I'm --
Q. Okay. You can answer. That's fine.
A. I'm trying to be responsive to your question.
Q. Okay.

A. Keep in mind that the reference in this footnote does not identify tobacco sales, it just says net sales. So what you have here is the total picture that goes beyond tobacco. That's point number one.
Point number two, the information in our analysis takes the information directly from the annual reports, as we talked about early this morning --
Q. Right.
A. -- and as I testified yesterday. As the companies reported the information, that's the information we used. However they reported it is the way we reported it. So we are taking their definition as they report it.
Q. Right. And because of their definition, did you make inquiry to determine whether the item that's reflected on that page was in fact excluded from the net sales figure for RJR Reynolds 1994 domestic tobacco? Did you make that inquiry or not?
A. We took the items as reported, as reported by the companies themselves. The figure that you're describing or that you're referring to is not specifically identified in their financial statements. The figure is a broader category and does not identify its relationship or lack of

relationship to tobacco, it merely says included in net sales. And my point here is is that you've got a category of net sales that go beyond domestic tobacco. It includes --
Q. But it --
A. -- food and it includes international activities as well.
Q. But it also includes domestic tobacco; does it not?
A. As a subset within the total net sales figures, that is correct.
Q. As you're sitting here today, do you know whether the item on that page is or is not in the net sales figure for domestic tobacco as it appears in the annual report?
A. I am merely taking the figures as reported in

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the annual report, and the figures in the annual report as reported, their definition, is the same definition I'm using.
Q. Now if we went to Philip Morris --
Are you familiar with the Philip Morris annual reports?
A. Yes.
Q. I'd like you to take a look at tab six, which is Plaintiffs' Exhibit 17624.

A. Okay.
Q. And if you could take a look at page 26 of that document. I believe that this is already in evidence.
A. Okay.
Q. Okay? Do you see that Philip Morris -- that's a --
That's a selected financial data 15-year review; correct?
A. Yes.
Q. Do you see that Philip Morris again provides operating revenues for 1994?
A. Yes.
Q. And export sales, and under that, cost of sales?
A. Yes.
Q. And do you see that for Philip Morris, the same item that we talked about in connection with R. J. Reynolds is included in their sales figure?
A. I see that.
Keep in mind that Philip Morris --
Q. Excuse me.
A. -- is --
Q. Can we first --
Did you say yes, it is included?
A. No. I said keep in -- keep in mind that Philip

Morris, a significant part of Philip Morris's operations is in alcoholic beverages.
Q. I am --
A. And the item here that you're referring my attention to identifies the relation to products. It doesn't say which products.
Also keep in mind that there are products here that go far beyond tobacco. And so again I think it's the same line as that the reference here is -- is -- your inference is that it's specific, and what it clearly says here is on products. That's general.
Q. I didn't make any reference at all. I'm just asking you whether the item that we described in connection -- in conjunction with R. J. Reynolds where it said it was excluded, is that item included in the revenue figures for Philip Morris? "Yes" or "no."
A. It is identified in this presentation as a deduction from the revenue figures, but again, this is an overall identification. It doesn't say -- provide any specificity to tobacco.

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Q. Do you know one way or another whether those items as concerns tobacco were included or excluded from the sales figures?
A. The annual report is not specific to that. The

annual report merely identifies on products and doesn't go with any specificity to any particular product.
Q. Would you agree with me that as between R. J. Reynolds and Philip Morris in 1994, that they had different accounting policies on what would be included in the net sales figures?
A. As to the specifics of their accounting policies, you'd actually have to go into a more detailed analysis, which is not available in their annual report, as to their accounting policies. Their general categories, they do identify some items, but these are very, very large companies, and what you're talking about is something on the order of magnitude of less than five percent of the total revenue item. And so I think the point is that you will see general differences in what they present, but overall they're going to be presenting net sales as they report and an operating income or operating profit as they report. We're merely taking the numbers as they report them. These are their numbers.
Q. I'd like to go back to the question.
Would you agree with me that as between RJR Reynolds and Philip Morris in 1994, that they had

different accounting policies on what would be included in the net sales figures? "Yes" or "no."
MS. WALBURN: Objection, asked and answered. And also object to counsel's instructing the witness how to answer.
THE COURT: Yes, he doesn't have to answer "yes" or "no," but he may answer the question.
MR. BERNICK: Would you please answer the question, Mr. Much.
A. Again, as they have different accounting policies as identified in the annual reports, generally what you'll find is they do report overall net sales, they do report overall profit figures. Beyond that I can't answer the question.
What we're doing is taking what is actually reported by these companies, we are taking their figures as they report them.
MR. BERNICK: Your Honor, I'd like to approach on side-bar to take up this issue.

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(Side-bar conference as follows:)

(Side-bar discussion concluded.)

BY MR. BERNICK:

Q. Just so we're clear -- and I want to go to the

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Philip Morris report that's before you there --
A. Okay.
Q. -- and now focus on what we've been talking about for --
Do it the right way. And then we'll blow it up.
A. Okay.
Q. Do we see that for Philip Morris, operating revenues are stated and then federal excise taxes on products are set forth for that year; correct?
A. Correct.
Q. And based upon -- we don't --
What you're saying is you don't know what particular products are affected by this; correct?
A. Well in fact if you refer to, in the same annual report, page 37, what you'll see is a breakdown of those operating revenues by business segment, which is what we used in our analysis, and what you'll see is the numbers add up, for tobacco, food, beer and financial services, to 65,125,000,000 for '94, which is the same total you have here for operating revenues, 65,125, but in the footnotes you'll see in the different business segments, you see no reference to that item. And the point is is that they are in

other businesses. They are -- their business goes beyond tobacco. Of the 65 billion, a sizable portion of their business is in food and beer and alcoholic beverages and also in real -- in the financial services and real estate. And so what these companies -- while they identify federal excise taxes, the operative phrase is "on products." They don't say "on tobacco," they say "on products." And that's the point.
Q. In point of fact, if we take the operating revenues for the company for 1994, do you know whether or not the operating revenues, the revenues for tobacco for Philip Morris, include or exclude federal excise taxes? Do you know?
A. You're asking me if the revenues include federal excise taxes?
Q. Correct, on tobacco.
A. Well that's a different question.
Q. I'll be very, very precise, Mr. Much. If you take the revenue figures for domestic tobacco for Philip Morris for 1994, the revenue figures, sales figures, do you know whether or not Philip Morris has included that portion of the revenues necessary to pay federal excise taxes or not?
A. Excuse me, your last question was again

different because you changed it from total sales to tobacco sales.
Q. That's what I meant to do.
A. Okay. And what this says, the reference to federal excise taxes is with respect to total sales here of the total sixty-five one twenty -- 65 billion 125 million, but if you go to the page back in the

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annual report, which is page 37, they identify the different business segments.
Q. Yes. What I --
A. This chart merely identifies federal excise taxes in relation to the whole, they do not identify federal excise taxes in relation to any particular product area.
Q. I'll put my question to you again. I'm really just asking whether you know or not. With regard to the sales figures for domestic tobacco for Reynolds -- for Philip Morris 1994, do you know whether or not those revenue figures include the monies necessary to pay federal excise taxes on tobacco? Do you know?
A. This annual report does not identify anything beyond federal excise taxes on products. We actually asked the tobacco companies for information on their revenues and profits within the state. The tobacco

companies did not provide that information. So when you're asking me that question, we have to look to the broader picture of the annual report, and the annual report merely identifies federal excise taxes on products, on products, which is throughout the entire company.
When you look at the segmented information, the footnotes in the back, there is no reference to excise taxes. It does not identify federal excise taxes by product or by category, it just says federal excise taxes.
Q. If we go to Reynolds for 1994, isn't it a fact that the general financial notes that appear for Reynolds 1994 says that excise taxes are excluded -- again we're talking federal excise taxes -- that they are excluded from net sales in the cost of products sold?
A. That's what that says, excise taxes are excluded. But again, the point is is that even with Reynolds, their business goes beyond tobacco.
Q. Do you know, "yes" or "no," whether the net sales figures that you used for Reynolds Tobacco 1994 include or exclude federal excise taxes on tobacco? Do you know?
A. We used the figures as Reynolds reported it. If

Reynolds excludes excise taxes from total sales, that does not say anything about tobacco sales. Again, this does not identify tobacco sales, it identifies net sales in the aggregate. So if they're referring to the entire company but they say nothing about --
It doesn't say net tobacco sales, that's the point. This is a footnote which does not identify tobacco sales, it merely identifies net sales.
Q. If you assume that the sales figures for the companies exclude federal excise taxes, how much would that be for 1994 off the dollar one?
MS. WALBURN: Objection, Your Honor, in

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view of the discussion this morning with the court.

THE COURT: The objection is sustained.

BY MR. BERNICK:

Q. Did you consider --

Let me get at it this way: If we're going to apply your operating income profit margin of 25.2 percent and we applied that to a dollar one, what would be the operating income profit for 1994 for a pack of cigarettes sold in the state of Minnesota? What would be the operating income profit number, given the dollar one and the 25.2 percent?

MS. WALBURN: Your Honor, may we approach the side-bar?

(Side-bar discussion as follows:)

(Side-bar discussion concluded.)

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BY MR. BERNICK:
Q. Do you have my question in mind, Mr. Much?
A. Yes.
Q. If we took the dollar one as the assumed manufacturer sales portion of this pack of cigarettes in 1994 and we applied an operating income profit margin of 25.2 percent per your report, what would be the operating income profit per pack in 1994?
A. The premise of your question makes certain assumptions which I think are incorrect.
Q. Your -- Your Honor --
A. The answer -- I'm trying to answer your question, sir. In answering your question, keep in mind that the tobacco companies do not pay state excise taxes. Ultimately the state excise taxes are paid by the consumers. The tobacco companies do not. Again, we asked the tobacco companies for information on sales and profitability; they didn't provide any information. And what you have here is that the difference between the retail level and the wholesale -- or the manufacturer level has a lot of things in it. There are costs in there. Without the information from the tobacco companies to analyze those differences in costs, you cannot make the determination that you're asking me about.

In our analysis we took an alternative approach. We had available to us a document from Philip Morris that identified manufacturer sales as a percentage of retail sales, and based upon that we did our analysis. Excise taxes were not a part of our analysis. Because once you identify manufacturer sales and you identify a profit margin, then you're able to identify profit in the state of Minnesota. And to --

In specific reference with the corrected assumption here, the profit margin remains at 25.2 percent.
Q. Mr. Much, if you could focus on my question for a moment, my question is this: If we take the 25.2 percent operating income profit margin that comes right out of your own report, 24308, the spreadsheet, and we apply that to the dollar one figure that comes from the 50 percent figure out of your report and the two dollar two cent figure out of your report, what is the operating income or profit for a pack of cigarettes in 1994?
A. Again, the problem I'm having with the question

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is that you're assuming that the taxes identified in the annual reports are tobacco-related.
Q. I'm not talking about taxes at this point.

A. All right.
Q. Okay? I'm just saying take your operating income profit margin from your report.
A. Okay.
Q. Apply it to the dollar one, which is the result of 50 percent assumed wholesale margin applied to two dollars and two cents, 25.2 percent applied to the dollar one, which is the 50 percent of the two dollars two, what is the operating income profit that is associated with this margin for 1994?
A. It would be 25 percent of a dollar one, or about 25 cents.
Q. Okay. Now if I were to apply that figure to a dollar one -- if I were to apply that figure to a dollar one less federal excise taxes; that is, 25.2 percent applied to revenues excluding federal excise tax, would I end up with a different operating income profit number? "Yes" or "no."
MS. WALBURN: Objection.
THE COURT: The objection is sustained.
MR. BERNICK: Okay.
BY MR. BERNICK:
Q. If we work with this 25 cent figure as operating income profit per pack of cigarettes in 1994, isn't it a fact, Mr. Much, that the tobacco companies don't

walk away with that 25 cents in their pocket?
A. You're asking me if they have other expenses beyond, their business expenses?
Q. Correct.
A. Sure.
Q. In fact, if you went to the Reynolds report for the same year, and now turn to selected financial data -- and you'll probably have a page better than I. This is 17693, tab three. I've got to find the right part of this thing. There we go.
A. What's your page number there?
Q. It's called selected financial data.
A. In the -- okay. I --
Q. Are you with me?
A. I recognize the page. I'm just looking for the specific --
I believe I've got it. It's page 29?
Q. Okay. Thank you.
A. Yes.
Q. Do we see that on this page we have operating income? That's the same as we saw in the other page; right?
A. That is correct.
Q. And after operating income, you then have other expenses, you have interest and debt expense?

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Source: http://www.industrydocuments.ucsf.edu/docs/xghl0001

A. Yes.
Q. And you have income taxes?
A. Correct.
Q. Okay. Then you have certain extraordinary items; correct?
A. Yes.
Q. And the amount of money that's left over from all of that is called net income; right?
A. That is correct.
Q. And net income is a figure that's commonly used to refer to kind of the profits when everything else has all been paid for; correct? What you put into your pocket or distribute to your shareholders.
A. In this case, in looking at operating income, operating income should be the proper measure of profitability.
Q. Excuse me.
A. Keep in mind that any verdict in this case will be treated as a business expense, it will be deducted from --

MR. BERNICK: Your Honor, I object to the statement from the witness. Move to strike these remarks and ask that he be instructed to answer the question.

THE COURT: The objection is sustained.

Just listen to the question asked.

THE WITNESS: All right, Your Honor.

BY MR. BERNICK:
Q. Mr. Much, is net income a number or a figure that is commonly used to report the money that ultimately is available for distribution to the shareholders?
A. Ultimately what is distributed to the shareholders, either in stock repurchases or dividends, --
Q. Okay.
A. -- may be referred as coming out of its cash flow, and the cash-flow statement is different from the statement you have here. You should be looking at the cash-flow statement which identifies distributions to shareholders, for example, dividends and share repurchases, and that's where you'll see that information.
Q. Okay. If we work with net income after you subtract out debt expense, interest expense and taxes, in the case of Reynolds, the net income is about one-fifth of operating income; correct?
A. In this particular case in this particular year, it would be about one-fifth of operating income.
Q. So if we wanted to put -- again, just to show a

relationship on here. In relationship to the 25 cents, the net income figure would be about a nickel a pack; right? Right, for Reynolds?

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Source: http://www.industrydocuments.ucsf.edu/docs/xghl0001

A. For Reynolds in 1994 you would take 20 --
Yes, it would run around a nickel a pack.
Q. I want to come back to a figure that you showed to the jury on your direct examination.
Let me try to do this right. Okay.
Do you recall -- this is Exhibit 24 -- Plaintiffs' Exhibit 24305, which is at your tab nine.
A. Okay.
Q. And you remember that that's the table that ultimately gave you --
Let's just do it this way. Get blown up a little bit like so.
That's the table from which you got this figure right here, the 1.8 billion dollars in Minnesota operating profit. Remember that?
A. Yes.
Q. Okay. And we --
I compared that to the 167 billion that's reflected on 30230. You remember that?
A. I do.
Q. This would represent in your view, according to your Minnesota analysis, the profits -- the operating

income earned by all the different tobacco companies on sales of cigarettes in the state of Minnesota; correct?
A. Yes.
Q. Okay. So that, based upon your operating income concept, yields your 1.8 billion dollars; right?
A. Yes.
Q. Operating income, operating income, 1.8 billion dollars, if we now extend this analysis over the time from 1954 to 1996; correct?
A. The total profits earned by the companies in the state of Minnesota is 1.8 billion dollars.
Q. Okay. Again, using your operating income profit and your operating income profit margin of about 25 percent; correct?
A. Yes.
Q. Have you ever done a calculation to determine, if you used net income, monies actually put in the pocket, how much net income the tobacco companies have earned from the sales of cigarettes in Minnesota over the same period of time?
A. That would be an improper calculation.
Q. Have you ever done --
A. Keep in mind that the tobacco --
Q. Excuse me, can you --

MR. BERNICK: Your Honor, I think he's starting out with a non-responsive answer. Can I have an answer to the question?
THE COURT: Let him -- let him answer the question.
A. When we asked the tobacco companies for their profits in the state of Minnesota, although they did not provide such information for the state of

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Source: https://www.industrydocuments.ucsf.edu/docs/xghl0001

Minnesota, the two tobacco companies that were responsive were Philip Morris and Brown & Williamson, and they did respond, and the figure they gave was not net profit, it was not net income, it was operating profit.

Operating profit is the basis by which to determine the profitability of the tobacco operations. When the tobacco operations report in their annual reports, as we were just looking at, they report their tobacco business segment on the basis of operating profit. What you find here is that if you look at the annual reports, operating profit is the key basis. Net income allows deductions for interest, it allows deduction for corporate income taxes. Interest would not be a correct deduction for this analysis. Interest is related to debt. The returns that we're talking

about to shareholders of dividends and share repurchases, that's cash that goes out to the shareholders, that is paid out of the corporation's fund out of the cash flow. In fact, in the last three years of '94, '95, '96, Philip Morris's dividends and share repurchases were in excess of 15 billion dollars, more than their entire debt. Had they not paid out those dividends and share repurchases, they would be debt free and in fact earning interest income.

So what you have here is, when you look at the suggestion here of net income, that is an improper basis to do this calculation by the fact that the companies that were responsive, the tobacco companies, Brown & Williamson and Philip Morris, they provided their answers with respect to operating profit, not net profit.

MR. BERNICK: I move to strike as non-responsive, Your Honor.

THE COURT: Well the answer will stand.

BY MR. BERNICK:

Q. Mr. Much, if you could focus on my question. It's real simple.

If you had used net income, that is considering you need to pay taxes and you need to pay off your

debt, if you use net income to calculate the total amount of net income that the companies have actually received from the sales of cigarettes in Minnesota, what would that number actually be, do you know?

A. First, a net income calculation would be an improper calculation as I've previously discussed, but if you're merely taking the mathematical calculation, then you would be taking 20 percent, approximately.

Q. Okay. And what would that number be?

A. Well it would be one-fifth, so it would be around 3.5, I think.

Q. It would be 350 million dollars; correct?

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Source: https://www.industrydocuments.ucsf.edu/docs/xghl0001

A. Your -- your mathematical calculation would be 350. But again, I disagree with the basis for that.
Q. Okay. Now I want to turn to the issue of value. You've talked about in direct examination value as in relation to profitability. Do you recall your testimony?
A. Yes.
Q. Determining the value of a business enterprise is a complex task; is it not?
A. Not if the company is publicly traded. In fact, if you look at the value of these companies as determined in the stock market by a broad consensus

of the investing public, not me, you and me collectively, individual investors, professional investors, mutual fund managers, stock market analysts, pension managers, a broad consensus of the investing public says, by the way that they have valued these companies in the stock market, that these companies in their aggregate are currently valued at 160 billion dollars. In fact, Philip Morris alone has a stock market value of 100 billion dollars. So if the company is publicly traded, as these companies are, you need only to look in the popular press. In the current issue of BusinessWeek there is a reference to Philip Morris at a hundred -- in excess of a hundred billion dollars. And the information is publicly available to determine the value of a public company.
Q. Let's begin it this way, Mr. Much. I want to go back to Exhibit 24305, which is your -- your tab nine and a chart that you displayed to the jury.
A. Okay.
Q. Do you see the entry for American Tobacco that I've highlighted?
A. Yes.
Q. Let me blow this up a little bit so the print is a little bit clearer. See that entry?

A. Yes.
Q. Now what that in fact reflects is the global consolidated operations not of American Tobacco, but of a company called -- I think it's now called Fortune Brands; correct?
A. It includes American Tobacco plus Fortune Brands, the prior American Brands, for the last two years.
Keep in mind, as I testified yesterday, American Tobacco became part of B.A.T, and we talked about the figures both with and without the last two years of American Brands. So that was what this represents.
Q. My question was: That refers to the consolidated operations of Fortune Brands, both domestic and foreign tobacco and other businesses; correct?
A. Fortune Brands and its predecessor American Brands going back.

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Q. Correct. That's what that refers to; correct?
A. Yes.
Q. Okay. So that includes the American Tobacco's domestic sales, it includes the foreign sales of other companies such as Gallaher's, it includes non-tobacco businesses that were owned by Fortune Brands; correct?

A. That is part of American Brands. It would include the businesses that evolved out of American Tobacco.
Q. Okay.
A. Keep in mind that the evolution of all these companies, because they started as tobacco companies --
MR. BERNICK: Your Honor, I move this -- this is repeated. I move to strike as non-responsive. I didn't ask him about the evolution of what occurred, I asked him a very simple question.
THE COURT: Well I think you can answer the question.
THE WITNESS: All right, Your Honor.
THE COURT: Continue your answer.
A. These figures go back 42 years. These figures include the tobacco operations and non-tobacco operations. As a result, it identifies not just what tobacco was, but what tobacco created by reinvesting those profits in the future. They emerged into larger, more diversified companies that went beyond tobacco. So the answer is, sure, it includes Fortune Brands for the last two years, which grew out of American Tobacco and American Tobacco's profits in the early years.

Q. Now the American Tobacco number that is included in the next part is not just domestic sales from The American Tobacco Company, that also includes sales from a company called Gallaher's; correct?
A. To the extent Gallaher's was part of American Tobacco, the answer would be yes.
Q. There are two different companies; correct, Gallaher's and American Tobacco Company? I mean there's always been two separate companies; has there not?
Do you know the corporate structure of American Brands, Mr. Much?
A. Generally, yes. American Brands, before it became Fortune Brands, became a variety of operations.
Q. Okay. And there was one company called American Tobacco Company, which sells cigarettes here in the United States, and there's another company called Gallaher's, which is a European company that sells cigarettes abroad; isn't that true?
A. Yes.
Q. And isn't it true that Gallaher's is not a defendant in this case, neither is American Brands?

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Source: https://www.industrydocuments.ucsf.edu/docs/xghl0001

A. As I recall, American Brands sold off American Tobacco back in 1994. As to whether or not the sale

of American Tobacco, if there is any type of judgment here, --
Q. Forget about --
A. -- just because they sold it doesn't mean that American Brand is not responsible.
MR. BERNICK: Your Honor, instruct the witness --
Q. Forget about judgments here. This is just a factual question. Okay?
The factual question is: Wasn't American Tobacco the company that sold tobacco here in the United States, and Gallaher's the company that sold cigarettes in Europe? True?
A. Yes.
Q. Okay. And isn't it true that Gallaher's and American Brands are not defendants in this case?
A. I believe that is correct.
Q. And isn't it also true that the only thing that Brown & Williamson bought in 1995 was American Tobacco, the domestic sales of tobacco, The American Tobacco Company; isn't that true?
A. Brown & Williamson bought American Tobacco.
Q. Okay. And American Tobacco --
When you say "American Tobacco" on these two entries here, those numbers go way beyond the sales

and performance of the company that Brown & Williamson bought; true?
A. Keep in mind as I testified yesterday --
Q. Can you --
Can you tell me the answer to that?
THE COURT: Counsel, don't interrupt the witness, please.
A. As I testified yesterday, we talked about these figures with particular regard to American Tobacco both with and without the last two years of American Brands. We identified yesterday how these figures would be lower, the American Tobacco figures for global would be lower. If you just use American Tobacco up to the point of the acquisition with B.A.T, it would be 22 billion dollars lower for revenues on global consolidated, and operating profits would be two billion dollars lower as we -- as I discussed yesterday.
Also as I discussed yesterday, the global tobacco operations, the revenues would be 13 billion dollars lower and the operating profits would be a billion dollars lower. If we just look at American Tobacco prior to the point of the acquisition which counsel is discussing, these figures would be reduced by the amounts that I talked about.

http://legacy.library.ucsf.edu/tid/ntq03a00/pdf
Source: http://www.tobaccoindustrydocuments.ucsf.edu/docs/xghl0001

Q. Isn't it --
A. As I testified yesterday.
Q. Isn't it true that what Brown & Williamson bought, American Tobacco Company, was purchased in a marketplace transaction for one billion dollars?
A. I believe they bought the equity for one billion dollars.
Q. And as of 1994, whether you look at -- however you want to measure it, what the market said that American Tobacco was purchased by Brown & Williamson was, what the value of that was was a billion dollars; true?
A. Again for the equity of Brown & Williamson, that is correct.
Q. Okay. And isn't it true that when the market makes those types of determinations, they not only consider what the history of profits has been, they also make, given the consideration, the risks that attach to the business and how it's going to perform in the future; correct?
A. A value will incorporate both risk of return in terms of future expectation.
Q. So that if you're looking to determine value, you can go and take a look at historical profitability --

THE COURT: Counsel.
MR. BERNICK: I'm sorry.
(Mr. Bernick resumes his position behind the podium.)
Q. If you're looking to find out value, you can look at historical profit -- profitability as one measure of what might occur in the future, but people who value companies also look to the risks that attach to the continuation of the business in the future; true?
A. Well when you have a long stream of stable profitability, there is a significant impact on valuation. Risk is considered, but more importantly when you look at the aggregate value of these companies, these companies have had a very long history of stable profits, of growing profits, and as a result today they have a value, excluding -- excluding the American Tobacco here, but just for the other companies, you've got an aggregate market value of 160 billion dollars as determined by the market incorporating all factors. All different types of factors are considered in that estimate. But the driving factor is profitability.
MR. BERNICK: This would be a good time to break, Your Honor, if you want to take that morning

break.
THE COURT: All right. We'll take a short recess.
THE CLERK: Court stands in recess.

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(Recess taken.)
THE CLERK: All rise. Court is again in session.
(Jury enters the courtroom.)
THE CLERK: Please be seated.

(Side-bar discussion as follows.)

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http://legacy.library.ucsf.edu/tid/nto37a00/pdf
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(Side-bar discussion concluded.)

(Discussion off the record between Ms. Walburn and the witness.)
THE COURT: Counsel.
MR. BERNICK: Thank you.
BY MR. BERNICK:
Q. Ready to proceed, Mr. Much?
A. Yes.
Q. Okay. I want to turn now to talk about advertising for a little bit, and direct your attention to some of the charts that were contained in Plaintiffs' Exhibit 20177A, which is in your book in tab 27.
A. Okay.
Q. Now this reflects, does it not, that --
If you take a look at the total dollar number for advertising for Philip Morris during the period of time described in the chart, you're talking about a substantial sum of money; correct?
A. Yes.
Q. And we can go through some of the other charts and again point out large sums of money that have been spent on advertising; correct?
A. Yes.
Q. But isn't it also true that you've done calculations to determine what relationship

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advertising bears to the amount of money that's being brought in through sales; correct?
A. As this chart shows, you've got advertising on one hand in the red, and domestic sales for '69 to '74 on the other hand which is the green.
Q. Okay. And if we actually went ahead and did the calculation to see, okay, we know that there's a lot of money in sales and not a lot of money in advertising, what's the relationship between the two, you've actually calculated some percentages; have you not?
A. Yes, I have.
Q. If we go further back in the document, could you determine for us, with regard to Philip Morris as an example, what percentage of total sales has been spent on advertising?
A. Going to the summary page, if you look at advertising, marketing and promotion, which is what you have here, to sales for '69 through '94, I believe that's the chart we're looking at.
Q. Correct.
A. All right. The percentage is 13.4 percent.
Q. And if we went -- just again to provide some perspective, ask you the same number for Reynolds. What would it be for Reynolds, according to your

determination?
A. Here you have different time periods.
Q. Right.
A. Okay. And if we were to take their response to their interrogatory, the advertising, marketing and promotion to domestic sales for '54 to '94, --
Q. Yes.
A. -- that would be 8.2 percent.
Q. And then you made your own determination based upon your analysis of some FTC report?
A. Well we took the FTC reports relative to what the other companies reported. We made an additional calculation for possible estimates there.
Q. And that was about a 16 point something percent?
A. It was 16.2 percent.
Q. Now I'd like to unpack a little bit about what these numbers actually mean as you set them forth in this chart, and from that point of view I'd like to go to the title. This chart -- and maybe I can blow it up a little bit -- relates not just to print advertising or billboards or magazines, this chart picks up all of the money that's spent on advertising, marketing and promotion; correct?
A. As reported by these companies in their response to the interrogatory, this is correct.

Q. Okay. Now I want to get into a little bit of what that really means, and I'd like to ask you to take a look at your report 20177A, which has been introduced into evidence, and take a look at the last page of that document and tell me what it is.

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A. The very last page?
Q. Yes.
A. You're referring to my footnote page?
Q. Is that what it is?
A. The very last page is a footnote page.
Q. Okay. So 20177A, the last page is footnotes.
I want you to take a look at the version of this report that you turned out originally, which is 20177, and it's at tab eight.
A. Yes.
Q. And could you tell me what appears at the end of that report.
That's not in evidence, is it, Mr. Much? You didn't refer -- you didn't refer to your original report on direct examination; did you?
A. No, I did not, I don't believe.
Q. Okay. Tell me what's at the end of your original report that's not in evidence.
A. Included in tab eight are some information from the FTC reports.

Q. And when the final report was issued and introduced to the jury, it doesn't include any of those FTC reports; does it?
A. There are not FTC documents in the other tab, no, sir.
Q. In fact, you did review the FTC reports on advertising, marketing and promotion with regard to cigarettes, you did review those reports in connection with your work in this case; did you not?
A. RJR in their response to the interrogatory deducted from their response certain estimates -- or excuse me, certain figures that they provided to the FTC, and as a result we made certain estimates based upon those deductions relative to what the other companies did report to the FTC. So yes, we made some additional calculations with respect to RJR in addition to what they actually reported.
Q. My question is: In fact did you review the FTC reports on advertising, marketing and promotion with regard to cigarettes, did you review these reports in connection with your work on this case?
A. Yes.
Q. Okay.
A. Yes.
Q. And you considered those reports to be reliable

and to provide information that was important to you in your analysis leading up to the opinions that you're offering in this court; correct?
A. The FTC reports were used only for the calculation of RJR's estimated advertising. Beyond that -- and all I did was that calculation with respect to the FTC reports, so I considered them reliable for that purpose.
Q. Okay. Take a look at tab two, which is Exhibit AM000563. I want to ask you if that's the FTC report

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to Congress and issued in 1996.
A. Tab two refers to an FTC report for 1994, not 1996.
Q. Okay. Tab two, 1994. Do you see it's issued in 1996?
A. Yes.
Q. Okay. And is that an FTC --
Is that the FTC -- the kind of FTC report or the FTC report that you used in connection with your work in this case?
A. Yes.
MR. BERNICK: Okay. We offer that, Your Honor. We offer that under Rule 705 and we also offer it as a government report under Rule 803.
MS. WALBURN: No objection.

BY MR. BERNICK:
Q. And do you see, if you take a look at the FTC's report --
THE COURT: Counsel, --
MR. BERNICK: I'm sorry.
THE COURT: -- the court will receive AM000 --
MR. BERNICK: 563, Your Honor.
THE COURT: -- 563. The court reporter kept typing, so I lost it.
THE REPORTER: I'm sorry, Your Honor.
BY MR. BERNICK:
Q. And in fact, if we take a look at the back part of Exhibit 20177, your original report, what you've done is to take tables out of the FTC's report which is now in evidence; correct?
MS. WALBURN: Can we have a page reference, counsel?
MR. BERNICK: It's in the report.
MS. WALBURN: A page reference, please.
MR. BERNICK: Page 18.
MS. WALBURN: Thank you.
MR. BERNICK: Actually it's page -- glad you asked -- page 14, 18 and 19.
Q. Correct?

A. You're referring to which tab?
Q. I'm referring to 20177, which is tab eight.
A. Okay.
Q. You included excerpts from the FTC's report which are not then contained in 20177A; correct?
A. Included in your --
Yes, there are these tables included.
Q. I'd like to go through some of those tables now, taken from the exhibit that we've introduced into evidence for just a moment, and let's just take 1994 as an example. If you turn to Table 3E, which is page 19 -- are you with me?
A. Yes.
Q. See that's called domestic cigarette, advertising and promotionals expenses for the year

http://legacy.library.ucsf.edu/tid/ntq37a00/pdf
Source: https://www.industrydocuments.ucsf.edu/docs/xghl0001

16 1994?
17 A. Yes.
18 Q. And if we go down here, it lists the type of
19 advertising and the percent of the total that each
20 type of advertising represents; correct?
21 A. Yes.
22 Q. Now if we take a look at --
23 First let me clarify: When you went ahead and
24 included the numbers in our pie charts here, if we
25 can get one out, these are youth prevention, but they

1 contain, for example -- I don't know what this
2 exhibit number is -- youth prevention expenses to
3 advertising, marketing and promotion, when you
4 prepared your pie charts that include reference to
5 advertising, marketing and promotion, those include
6 the totality of all the items that we see in the FTC
7 report; correct?
8 A. That chart you just identified, I believe, is
9 Brown & Williamson.
10 Q. Uh-huh.
11 A. Okay. This document was used only to calculate
12 the advertising estimate for RJR because their
13 response to the interrogatory was incomplete. They
14 deducted certain expenses based upon what they
15 reported to the FTC. For all of the other -- and for
16 all the other companies we reported the advertising,
17 marketing and promotion expenses which they reported,
18 which they defined.
19 Q. I understand that. But those in fact include
20 not just newspapers and magazines, those numbers
21 include all of the different items of expenditure
22 that are on the screen; correct?
23 A. It includes whatever they included in their
24 response. Again, I am not interpreting what they
25 say, I'm merely identifying what they said and

1 included in their response and the calculations based
2 upon their response.
3 Q. Well I understand what you did, but I'm asking
4 really a factual question. The numbers that are
5 contained on these pie charts for advertising,
6 marketing and promotion in fact include not just the
7 cost of print advertising or billboard advertising,
8 in fact they also include all of the other items that
9 are on the screen from the FTC report; correct?
10 A. I would have to say I do not know the answer to
11 that as you've asked it, because these companies have
12 identified what they have defined. They may or may
13 not be consistent with the categories that are
14 included in the FTC report. What I'm taking is what
15 these companies reported. It was their definition.
16 It was each company's individual definition of
17 marketing, promotion, advertising, et cetera. So
18 however these companies defined it, I took it as they
19 reported it through the discovery process in this
20 case.

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Q. Well when it came to Reynolds and Reynolds' number was lower, you substituted for Reynolds' number the number that comes out of the FTC report, including all of the different items that are on the screen; correct?

A. Wrong.
Q. That's what --
A. Your -- your operative phrase was "substitute."
Q. Include in your summary. Your 16.2 percent figure represents the results of your taking from the FTC report the expenditures in all of these different categories; correct?
MS. WALBURN: Excuse me, counsel, I don't believe that counsel gave the witness an opportunity to complete his answer.
THE COURT: You did interrupt the witness, counsel.
MR. BERNICK: I apologize. I'm sorry. Go ahead.
A. When you asked the question about RJR, I gave you the actual advertising figure which was, I think, about eight percent something. You then asked me about the estimated advertising figure, and that was the 16.2 you put up on the board. In our answer to that we did RJR two ways. RJR, we took the numbers that they reported first and we added up those numbers just like we did all the other numbers for the companies that reported their advertising, marketing and promotion expenses. However, RJR, in their answer to their interrogatory, identified that

they deducted certain amounts that they reported to the FTC following -- for the years 1975 and thereafter, so what we did was, first, identify the amounts that RJR identified with their definition, and then what we did was compare the numbers reported in the FTC reports; for example, the total of the four -- four billion eight thirty-three --
Well, if you add up all the other companies but RJR, there's a difference, and that gap, we said let's take a supplemental look, a second look at RJR. So we reported it two ways. But first we reported it the way they reported it. And what you have there on your chart of 16.2 is only one of the two answers with respect to RJR.
Q. And with respect to the 16.2 percent, in order to get that figure, didn't you include each and every category of expenditure that is reflected in the FTC's report?
A. In our calculation we included the entire amount that shows in the FTC report, yes.
Q. Okay. Now if we go into these numbers and begin, for example, with promotional allowances, promotional allowances are basically a way of promoting a product by offering -- it's a financial incentive for people who are selling the product;

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correct?
MS. WALBURN: Objection to the form. Counsel is testifying.
THE COURT: Okay. Rephrase the question, please.
BY MR. BERNICK:
Q. Well isn't --
Is my description correct, Mr. Much?
A. I've not done an analysis or looked at the -- identified specifically what these are. We're merely taking them as reported. We're not doing an interpretation as to what they are. We're merely looking at the overall categories reported by the FTC, and we're looking at the responses to the companies.
Q. So you're not --
A. We're not -- we're not doing an interpretation of what these things mean, we're merely looking at what they are and their relative magnitudes.
Q. Okay. So you don't know whether promotional allowances are price incentives as opposed to actual communication with the consumer, you just don't know?
A. I'm only taking what they reported as they have defined them, and that's it.
Q. As they defined them.

Aren't they defined? Do you know what the FTC --
A. Are you asking --
Are you asking about the FTC report or --
Q. Yes. Yes.
A. I believe there is some discussion early on in the report about various aspects of these categories.
Q. Well how are promotional allowances defined?
A. You would have to go earlier in the FTC report to see how they are defined in the FTC report.
Q. Did you take the time to go and take a look and see?
A. Through the process, we did review the FTC report, but what we used were just the numbers identified in terms of the total category relative to how the companies reported.
Q. Okay. Would you --
A. And that was -- that was, by the way, only for the estimated numbers.
Q. All right. Could you agree with me that promotional allowances in fact are price-related marketing activities?
MS. WALBURN: Object to the form and asked and answered.
THE COURT: Sustained.

BY MR. BERNICK:

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Q. Well based upon your review of the FTC's own definitions, isn't that what promotional allowances are?
MS. WALBURN: Objection, asked and answered.
THE COURT: You can answer that.
A. You're asking me the definition of "promotional allowances" --
Q. Yes.
A. -- as defined by the FTC?
Q. As you understood the FTC's approach here, isn't it a fact that promotional allowances are price-related marketing incentives rather than communications with the consumer?
A. I'd have to go look and -- at the actual definitions, but I -- I'd have to go back to look at the report in terms of the actual definition for that.
Q. Is it true that, according to the FTC in 1994, those represented a full 34.7 percent of the total marketing, advertising and promotion expenditures?
A. Of the total four billion eight, promotional allowances were 34.7 percent.
Q. If we go down to coupons and retail value added,

isn't it a fact that that is another price-related form of marketing promotion rather than being a communication with the consumer?
A. Again, we'd have to go back to the exact definition as defined in the FTC.
Q. Do you know one way or another whether my description is correct?
A. I don't recall if that's the exact definition they used.
Q. If we take those two numbers; that is, the 34.7 percent and the 25.8 percent, we're talking about 60 percent of the total expenditures on marketing, advertising and promotion; correct?
A. Yes.
Q. And if we were to subtract that 60 percent out in order to simply pick up the communication forms of advertising, assuming that these are price related, we would be left with 40 percent of the 16.2 or approximately, what --
MS. WALBURN: Object to the form. Counsel is testifying.
THE COURT: Okay. You are testifying, counsel.
Q. I'll put it in the form of a hypothetical. I want you to assume that under the FTC's rubric, Mr.

Much, promotional allowances, coupons and retail value added are all price-related forms of advertising. Do you have my assumption in mind?
A. Yes.
Q. Okay. And if we subtracted that out from the total as it concerns RJR, you would end up with only

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40 percent of your 16.2 figure; correct?
A. I guess I don't understand your distinction because whether you're looking at, as you describe, print advertising to the consumer or promotions or discounts, et cetera, the end result is to get your product out to the consumer. It's the same concept. You're trying to expand your sales. So I -- I don't understand your distinction there.
MR. BERNICK: Your Honor, I believe that's non-responsive. If the witness wants to get into the whys, I think that opens the door to a whole new line of examination that I'm prepared to pursue; otherwise, I would move to strike the answer as non-responsive. I'd asked for a simple calculation.
THE COURT: Well I think he said he doesn't understand your distinction. I think he can testify to that. I think that you can re-ask the question, however, what the calculation -- if your calculation is correctly calculated.

BY MR. BERNICK:
Q. If we take 40 percent of 16.2 percent, what's the result?
A. Forty percent of 16.2 percent?
Q. Correct.
A. It would be, what, about six percent.
Q. Now have you done any work, Mr. Much, to --
Well let me put it this way: Isn't it true that with regard to the annual reports that you examined in connection with this case, the percentage that advertising bears to total sales is something that's frequently discussed by companies?
A. It may be discussed in their annual report, yes. Some companies have discussed it, some companies have not.
Q. I want you to turn to Plaintiffs' Exhibit 20035, which is at tab seven.
A. Okay.
Q. Do you see that that's the annual report for Coca-Cola for 1995?
A. Yes.
Q. Is that an annual report that you reviewed and relied upon in connection with your work in this case?
A. Yes.

MR. BERNICK: We offer it, Your Honor.
MS. WALBURN: Objection, outside the scope of the direct testimony.
THE COURT: The court will receive 20035.
BY MR. BERNICK:
Q. Okay. I want to direct -- direct your attention, Mr. Much, to a particular portion of this document, if I can get it up. Do you see it's this page, which is page 43, that the company describes how much money it has spent on direct marketing expenses?

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A. Yes, it does.
Q. And it's about 3.8 billion dollars; correct?
A. Yes.
Q. And if we want to then take --
Let's put that down for just a minute so we don't lose that thought.
If you compare that to their total sales -- do you find their total sales at page 48?
A. Yes.
Q. And do you see that it's reported there that their total sales for 1995 were about 18 billion dollars?
A. That is correct.
Q. For Coca-Cola, what is the percentage

relationship between the amount that they spend on advertising and the amount of their sales?
MS. WALBURN: Objection, relevance, and outside the scope.
THE COURT: No, you may answer that.
A. It looks like about 20 percent.
Q. Is it true, Mr. Much, that these figures, the ratios of advertising to sales, are routinely tracked in the advertising industry?
A. They may be tracked by the advertising industry, among other factors, sure.
Q. Okay. Did you do any work before you came in to testify and offer your report which includes these percentages, did you do any work to see what research showed about how these percentages compare with other industries?
A. My report merely presents a summary of what the tobacco companies report. Beyond that, no, sir, I have not done any further analysis outside of that scope.
Q. If we go back to the FTC report, and in fact the tables that you originally attached to your report, do we see that those tables reflect total amounts spent on advertising over the years going back to 1970?

A. They will reflect the total amount spent as reported to them by the tobacco companies.
Q. Recognizing that, do they take it basically back to 1970?
A. I believe that is correct.
Q. And if you go take a look at the figures that result from 1970 all the way through 1994, see that originally the total amount spent was about 361 million dollars?
A. Which year are you -- are you referring to --
Q. I'm referring to table three.
A. Okay.
Q. 1970, at page 14.
A. And which tab are you in?
Q. I'm actually looking back at your original report.

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A. In tab seven?
Q. Ah --
A. No.
Q. That would be at tab eight.
A. Okay. Okay. I'm sorry. What is your question?
Q. In 1970 the total expenditures were about 361,000,000?
MS. WALBURN: Can we have a page citation to Exhibit 20177, please? I can't find that.

MR. BERNICK: That's because you're working with 20177A, which included them.
MS. WALBURN: No, it's not.
MR. BERNICK: This is what was furnished to us as 20177.
MS. WALBURN: Can I have a moment, Your Honor, because my exhibit is in a different format.
MR. BERNICK: Well this is the report that was given to us by the witness.
MS. WALBURN: Well could I have a moment, please?
MR. BERNICK: Oh, sure.
MS. WALBURN: Okay. Thank you.
MR. BERNICK: Okay.
BY MR. BERNICK:
Q. You see that the figure there is 361,000,000?
A. Yes.
Q. And you see that by 1994, which is the last entry, the figure has risen to 4.8 billion?
And I may not have captured the right scale over here, but essentially the expenditures on advertising, marketing and promotion have increased over time; have they not?
A. They have.
Q. And if we wanted to further reflect the items

that I asked you about originally, promotional allowances and coupons, that is, the price-related items, would it be fair to say that the price-related items also have risen during the same period of time? Take a look at the table if you want.
A. The promotional allowances have also risen during the same period of time.
Q. Okay. And if we take a look at Exhibit -- Plaintiffs' Exhibit 24305, which is at tab nine and is in evidence -- are you with me on that? Tab nine --
A. You said tab nine?
Q. Tab nine, page 10.
A. This exhibit book has in tab nine my profitability report, not the chart you have up there.
Q. Right. I'm going to get that -- flash it up here in a second.
A. Okay.
Q. If you just get to it, 24305, page 10. If I can do the swipe the right way. That is the wrong chart.

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Why don't we just put it on the Elmo. Can you switch on the Elmo? Okay. There we go.
A. Okay.
Q. Is that a chart out of your report?

A. Yes.
Q. And what that --
Does that reflect what's happened to the total unit volume sold over time?
A. In the United States, yes.
Q. In the United States.
And does that reflect that during this period of time; that is, from 1970 to 1994, while all this advertising is taking place, volume has at first risen and then fallen?
A. Well wait a minute.
MS. WALBURN: Objection, outside the scope.
Q. Does that reflect domestic unit volume in billions of cigarettes over time?
THE COURT: Okay. The objection is sustained.
MR. BERNICK: This would be a good place to break. I've got another section, Your Honor, then I'll be through. It won't be very long.
THE COURT: All right. Then why don't we recess, reconvene at about 10 to 2:00.
THE CLERK: Court stands in recess, to reconvene at 10 to 2:00.
(Recess taken.)

AFTERNOON SESSION.
THE CLERK: All rise, Ramsey County District Court is again in session.
(Jury enters the courtroom.)
THE CLERK: Please be seated.
THE COURT: Counsel.
MR. BERNICK: Thank you.
BY MR. BERNICK:
Q. Good afternoon, Mr. Much.
A. Good afternoon.
MR. BERNICK: Good afternoon, ladies and gentlemen.
(Collective "Good afternoon.")
BY MR. BERNICK:
Q. I want to turn to two more what I hope to be very short topics. The first deals with research and development.
Do you recall as a part of your report, which is entered as 20177A, you prepared a series of pie charts reflecting the relationship between research and development expenditures and advertising, marketing and promotion expenditures? Do you recall those charts?
A. Yes.
Q. Okay. And if I can get one back up

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here -- there it goes -- is that one of them?
A. Yes.
Q. And what this reflects here is the R&D number for Philip Morris, and there's the advertising, marketing and promotion number for Philip Morris; correct?
A. Correct.
Q. Okay. Now let me understand --
I'd like to understand a little bit about what's -- what's on the chart and -- and maybe some of the things that are not, so people can be clear on how it got put together.
With regard to research and development, I take it that the number that we have here is a number that comes off the financial statements that you reviewed. Would that be accurate?
A. That number comes off the answers to the interrogatories --
Q. Okay.
A. -- that were provided by the defendants in this case.
Q. Okay. And isn't it true that typically, in financial statements the companies issue, they will often include a line item for R&D expenditures as one of the line items reflecting what money is being

spent for?
A. When you refer to "financial statements," are you talking about the annual reports?
Q. Well annual reports or -- not necessarily annual reports. Let me rephrase the question.
Is it common in the business world for companies to keep track of and monitor what they call R&D expenses?
A. Companies will typically keep track of R&D expenses. Here, though, what you have are the answer to the interrogatories is reflected in this number and that answer -- or the question related to R&D in connection with smoking and health. The difference when I --
That's why I asked you about the annual reports, because the R&D as reflected in the annual reports for these companies may go far beyond that. For example, they may talk about R&D in connection with new-product development, they may talk about R&D in connection with other types of things totally unrelated to tobacco, totally unrelated to smoking and health. That's why I asked the question.
The information on this chart only reflects the information provided through the discovery in this case, where, for example Philip Morris, we asked them

a question regarding R&D related to smoking and health, they gave us all the R&D as reflected in this

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figure.
Q. All right. Well, but I guess what I'm asking you is this: If a company were in its own internal financial records to record as research and development the activities of a given department and not to include other costs that it might have which are also related to the product, that's something that the company would decide to do in its own business judgment; correct?
A. You're asking me in a hypothetical, in a general sense.
Q. Yes, in a hypothetical. Companies record and budget R&D information depending upon their own judgment about how they want to monitor and report their expenditures; true?
A. In connection with your hypothetical, there are many categories where companies will record various expenses in their own way for their own internal tracking purposes. This particular chart refers only to what they provided through the discovery process.
Q. Okay. So, for example, there's been testimony earlier in this case --
But I'll just put the question to you this way:

If a product goes -- a new, potential product goes through development, through the R&D department, those costs may be separate from other costs that might be incurred once the product comes out of the R&D department and goes into manufacturing and potential test marketing. Do you understand what I'm saying?
MS. WALBURN: Objection, form, vague, and calls for speculation.
THE COURT: Do you understand the question?
THE WITNESS: The question is very hypothetical, very broad, and that's why I asked you about the hypothetical versus specifics. And if you could give me some more specificity, perhaps I could be more responsive.
MR. BERNICK: Well I --
THE COURT: Okay. Counsel, rephrase the question.
MR. BERNICK: I will. I'm sorry, I'm sorry for interrupting, Your Honor.
BY MR. BERNICK:
Q. A new product is being developed at a company, hypothetically. R&D department spends time on it. Costs will be recorded for the R&D activities relating to the product. It's determined to try to

make the product and test market it. Product goes into manufacturing and ultimately into a marketing phase. Are you with me hypothetically?
A. Yes.
Q. If that process were to take place with respect to a new product that's being developed by the tobacco company, in your experience isn't it true

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that not all of those costs would necessarily be recorded as R&D costs?
A. It depends upon their own internal reporting procedures. Again, we ask them for all costs related to R&D and smoking and health. That's what my analysis shows. Beyond that I've made no analysis of the tobacco companies' R&D.
Q. Okay. That's really what I was getting at. You took at face value the numbers that were reported in response to the interrogatory relating to R&D and you made no independent investigation to see if there were other costs that might be associated with test products or new products; correct?
A. We took the numbers as provided by the companies. We assumed the validity of those numbers provided to us in answer to that interrogatory.
Q. Also not on this chart, I take it -- you're --
You're familiar with the fact, are you not, that

cigarettes are one of the most heavily researched products in the world today?
MS. WALBURN: Objection to form. Counsel is testifying.
THE COURT: Okay. Rephrase the question, please.
BY MR. BERNICK:
Q. Do you have any understanding, Mr. Much, as to whether cigarettes are one of the most heavily researched products known to man today?
MS. WALBURN: Same objection, also outside the scope of direct.
THE COURT: Well the question didn't change, but I'll allow the answer.
MR. BERNICK: Thank you.
A. I did not do such an analysis, so I don't know.
Q. Well I take it, then --
Let me ask you this question: When it comes to the numbers that appear on these charts, I take it that they don't -- they're not designed to reflect the cost and scope of other research that might have been done on cigarettes, they only pick up the R&D expenditures of these particular companies; is that accurate?
A. They are the R&D expenditures which the

companies provided, the individual tobacco companies provided in their answer to that question. That's all they are.
Q. I want to turn for a moment to some of the pie charts relating to youth prevention expenditures, if I can get it up there.
If you'd take a look at 20177A, and in particular I've put a chart up here related to youth prevention expenditures, is this another one of the charts that you prepared as part of your report?
A. Yes.
Q. Now again you picked out the numbers. For

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example, this number here for RJR of 19 million dollars, do you see that?
A. Yes. That is the answer that they provided in their interrogatory.
Q. Okay. Now did you make any comparison between the expenditures from the tobacco companies on youth prevention activities and the expenditures for the state of Minnesota regarding the same types of activities? Did you make any comparison?
MS. WALBURN: Objection, relevance and outside the scope.
THE COURT: Sustained.
BY MR. BERNICK:

Q. Did you make any effort to determine, Mr. Much, the reasonableness of any of these expenditures, or was that not within the scope of your investigation in this case?
A. All I did was to take the information provided by the companies and provide the presentation, the charts that we described -- we're describing here today. We did not do anything beyond adding up the numbers provided by the tobacco companies.
Q. Well let me -- let me get it this way: We've now seen a whole series of charts that you prepared. There's a chart on youth prevention, there's a chart on R&D, there's a chart on marketing. You prepared all of those charts; true?
A. Correct.
Q. And you've told us, both on direct examination and on cross-examination, that these charts accurately reflect the information that was provided to you in most cases by the tobacco companies; correct?
A. This is the information provided by the tobacco companies, correct.
Q. Now did the tobacco companies tell you to make a comparison, as you do on these charts, between youth prevention expenditures and sales? Did the tobacco

companies ask you to make that comparison?
A. The only thing I've received from the tobacco companies are the information in response to the interrogatories that they were asked. I have not had any dialogue with the tobacco companies.
Q. Did the tobacco companies ask you to make a comparison between R&D expenditures and marketing expenditures?
A. Again, I have not had any dialogue with the tobacco companies.
Q. Now by making these charts, including those comparisons, is your effort to communicate to this jury that you believe that these comparisons are appropriate comparisons to make?
A. As I testified in my direct examination yesterday, I'm offering no opinions regarding the information in these charts other than the numbers

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provided and the relative proportions. I'm not offering anything in terms of any subjective judgments at all.
Q. But you could have asked --
You could have told the jury the information that the tobacco industry has provided you on youth expenditures by simply showing what's on the screen now; correct?

MS. WALBURN: Objection, form, argumentative.
THE COURT: It's argumentative.
BY MR. BERNICK:
Q. Well let me just ask you: Whose idea was it, Mr. Much, whose idea was it to make the comparisons that are reflected in these pie charts? Was that your idea, or was that the idea that was given to you by the state or their counsel?
A. Unlike in the profitability analysis where I was doing a judgment with respect to aspects of my analysis, in the R&D analysis the relative categories to compare were chosen by counsel.
Q. Was that also true with regard to youth expenditures, were the categories to compare chosen by counsel?
A. Yes.
Q. Was that also true with regard to marketing and promotion, that the categories chosen were chosen by counsel?
A. The categories were chosen by counsel.
Q. Did they suggest you putting this in pie chart form?
A. Yes.
Q. At any point in time did counsel ask you to make

a comparison between the youth expenditures, the youth prevention program expenditures of the tobacco industry and those of the state of Minnesota?
MS. WALBURN: Objection, outside the scope and relevance.
THE COURT: Okay. I think you're getting into what counsel is instructing him to do. Sustained.
BY MR. BERNICK:
Q. You're comfortable that when it comes to the profitability analysis, that that's an area where you were the one who designed the presentation that was made to the jury?
A. The profitability analysis was an analysis that I put together. I made all the determinations as to how to do it, how to present it, in its entirety.
Q. Did you make the presentation -- the determination to put into one category the financial information for BATCo and B.A.T Industries? Was that your decision or the decision of counsel?
A. In which chart are you --
MS. WALBURN: Excuse me. I'm going to

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object to this line of questioning again.
THE COURT: No, you can answer that.
A. Which chart are you referring to?

Q. The profitability charts that you've showed on direct examination. Let me see if I can get one back up here.
That one.
A. That was my decision.
Q. Okay.
A. For example, what you have with B.A.T, B.A.T is a publicly traded company in the U.K., Brown & Williamson is a subsidiary of B.A.T. What you have here are global operations worldwide looking at the parent company, and in this particular chart we're looking at the parent companies for all of these operations. Keep in mind they have very similar names, and when you're looking at the total operations of both tobacco and non-tobacco, it would be logical to look at B.A.T, not Brown & Williamson. That was my determination.
MR. BERNICK: Can we get the Elmo on, please? Thank you.
Q. In fact, I believe that you testified on direct examination that -- this is page 8810 and 8813. You testified that Brown & Williamson was acquired by a predecessor to B.A.T, British-American Tobacco, back in the late '20s. What you found is that Brown & Williamson, being the domestic operation, expanded

domestically, while the then British-American Tobacco, which ultimately became B.A.T Industries, expanded internationally. Is that your testimony on direct examination?
A. Yes.
Q. And under that testimony, British-American Tobacco was a predecessor to B.A.T Industries and ultimately became B.A.T Industries; correct?
A. Yes.
Q. And in fact, on the chart that we were just displaying, if we can go back to that, when it came to BATCo and B.A.T Industries, you made no distinction in any of your presentations; did you?
A. Correct. I'm treating them all as B.A.T, B.A.T Industries.
Q. Isn't it a fact, Mr. Much, that the British-American Tobacco Company originally bought Brown & Williamson in 1923?
A. Actually I think it was in 1927.
Q. 1927.
A. But it was in the late '20s.
Q. Isn't it a fact that today BATCo still exists and hasn't been turned into any other company? Isn't that a fact?
A. What you have in this organization, you've got

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Brown & Williamson, and then you will have -- and it's changed over time, at one point they had BATUS, which is BAT U.S., and then they had B.A.T Holdings, and then they had another entity, and it goes all the way up to the parent company, which is B.A.T Industries P.L.C.
Q. My question to you is this specific: Isn't it a fact that BATCo never became B.A.T Industries?
MS. WALBURN: Objection to the form. Counsel is testifying.
THE COURT: Okay. You are testifying.
Q. Do you know one way or another, Mr. Much, whether it's true that BATCo has never become B.A.T Industries? Do you know?
A. What I know is that Brown & Williamson was acquired by a predecessor of B.A.T Industries and today remains a subsidiary of B.A.T Industries.
Q. Isn't it a fact that the predecessor to B.A.T Industries was the Tobacco Securities Trust, not --
MS. WALBURN: Objection.
Q. -- BATCo?
MS. WALBURN: Objection, counsel is testifying.
THE COURT: You are testifying, counsel.
BY MR. BERNICK:

Q. Do you have any knowledge, Mr. Much, as to who the true predecessor of B.A.T Industries actually was? Do you have any knowledge of that?
A. Yes. Going back through the '20s, B.A.T went through a series of changes, but the original company, my understanding, was British and American Tobacco Company.
Q. And that company still exists today as a separate company from B.A.T Industries; isn't that true?
A. My understanding is that Brown & Williamson today, while it may have subsidiaries in between or entities in between Brown & Williamson at the bottom and B.A.T Industries at the top, ultimately Brown & Williamson is owned by B.A.T Industries P.L.C.
Q. If you could focus on my question, my question is this: Isn't it a fact today that British-American Tobacco Company still exists and it's a separate company from B.A.T Industries? "Yes" or "no."
MS. WALBURN: I'm going to object to the form of the question.
THE COURT: Okay. You needn't answer it "yes" or "no." You can answer it if you know.
A. My understanding is that BATCo is part of B.A.T Industries P.L.C. Brown & Williamson is held

ultimately by B.A.T Industries P.L.C.
Q. Is B.A.T Industries the same or a different company as British-American Tobacco?
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A. The other day when we worked through the chain of command and all the operations in between, you will find that British -- excuse me, Brown & Williamson is ultimately owned by B.A.T Industries P.L.C. You may have entities in between; for example, they have organization charts where you may see Brown & Williamson, BATUS, which is B.A.T United States, they'll have B.A.T Holdings, they'll have another company called Southwestern Nominee, and it will go all the way up the chain of command. Ultimately it is owned by B.A.T Industries P.L.C.
Q. And the question that I asked you was not the line of ownership. I just want to know if these are the same -- whether they're successor companies, one ultimately became another. Are they the same company or not, B.A.T Industries, BATCo, are they the same or different?
A. Ultimately they are in the same corporate group and they are all owned by B.A.T Industries P.L.C. You may have subsidiaries whereby you may have a separate entity called a BATCo, but it is only within the B.A.T Industries P.L.C. group.

Q. Would you recognize and would you agree with me that BATCo is a separate company from Brown & Williamson is a separate company from B.A.T Industries?
MS. WALBURN: Objection, repetitive.
THE COURT: Okay. I think it's been asked now and answered.
BY MR. BERNICK:
Q. Do you stand by your testimony, Mr. Much, that BATCo was the predecessor to B.A.T Industries?
MS. WALBURN: Objection, form, and asked and answered.
THE COURT: It's been asked and answered.
MR. BERNICK: I have nothing further.
THE COURT: Counsel, unless you're going to use that, would you remove it so that everybody can see?
(Easel removed from the well.)
MS. WALBURN: Good afternoon, ladies and gentlemen.
(Collective "Good afternoon.")

REDIRECT EXAMINATION

BY MS. WALBURN:
Q. Good afternoon, Mr. Much.
A. Good afternoon.

Q. As a financial analyst --
THE COURT: Counsel, counsel, I'm sorry, we'll have to take a short recess.
THE CLERK: Court stands in recess.
(Recess taken.)
THE CLERK: All rise. Court is again in session.
(Jury enters the courtroom.)

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THE CLERK: Please be seated.
THE COURT: Counsel.
MS. WALBURN: Thank you, Your Honor.
BY MS. WALBURN:
Q. Mr. Much, as a financial analyst, in your own practice do you analyze one industry or do you analyze and look at a variety of industries?
A. I look across all industries, variety of industries.
Q. And is that unusual for financial analysts?
A. No, it's not unusual.
Q. And why is that?
A. Because most financial analysts do work across all industries. They are generalists. It's security analysts or stock market analysts that focus on particular industries.
Q. Now Mr. Bernick asked you a number of questions

about operating profits versus net income. Do you recall those questions?
A. Yes.
Q. In this case did the plaintiffs ask the defendants to provide the numbers for their U.S. profits?
A. Yes.
MS. WALBURN: May I approach, Your Honor?
THE COURT: Go ahead.
(Document handed to the witness.)
BY MS. WALBURN:
Q. Looking at Exhibit 4860, can you read the title of this exhibit?
A. This says "Philip Morris' Response to Plaintiffs' First Set of Requests for Production of Documents."
Q. And would you turn to page 13, request number 16.
A. Yes.
Q. Is this the question that plaintiffs asked the defendants to respond to with respect to profits?
A. Yes.
MS. WALBURN: Your Honor, we would offer this just for illustrative purposes at this point. Exhibit --

MR. BERNICK: I'm sorry.
MS. WALBURN: -- 4 -- Exhibit 4860.
MR. BERNICK: Your Honor, this is a document request. I object. I don't think there's a foundation that's been laid that establishes the relationship between a document request and the witness's testimony, and I further don't believe that this was designated. It may have been, but I don't believe it was.
MS. WALBURN: The foundation will be laid in the next couple of questions, Your Honor, with respect to how they define profits in this case. The document was not specifically predesignated. The

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issue arose during counsel's cross-examination.
THE COURT: All right. Well I'll withhold the decision on whether we'll allow this exhibit. Go ahead.
MS. WALBURN: May I read from the document, Your Honor?
THE COURT: Yes.
BY MS. WALBURN:
Q. Does request number 16 state, "All documents which summarize profits from cigarette sales in the United States for each year since 1952, by company and by the industry?"

A. Yes.
Q. In this request did the plaintiffs define what they meant by "profits" and how to calculate profits?
A. No, they just identified the word "profits."
Q. Did any of the defendants provide information beyond their annual report in response to this request?
A. Yes. They were Philip Morris and Brown & Williamson.
Q. And in providing information in response to that request, did Philip Morris and Brown & Williamson provide profits numbers before or after taxes?
MR. BERNICK: Your Honor, at this point the witness has testified to some provision of information. There's no foundation that establishes what the witness knows concerning the documents actually furnished to the depository in response to this request, what those documents might have been, and what particular portions of those documents he's referring to. So there's a lack of foundation for the question that's just been posed.
THE COURT: Let's see if he can answer it.
BY MS. WALBURN:
Q. Mr. Much, do you recall the information provided by B&W and Philip Morris in response to this request?

A. Yes, I do.
Q. And do you recall whether the information provided by Brown & Williamson and Philip Morris was profits before or after taxes?
MR. BERNICK: Your Honor, it's the same objection. We don't know what information he's actually referring to, what piece of paper. This is a document request. What particular piece of paper is he talking about? And is that all that was provided? We really don't have at this point a foundation for that question.
THE COURT: No. Well you can answer the question, and then you can go into identifying a particular document if you want to do that.
Q. Can you describe the documents that were provided by Philip Morris and Brown & Williamson.
A. Sure. Philip Morris provided a schedule year by year identifying sales and operating income. Brown &

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Williamson -- and that -- that went for every single year from '54 to '96. Brown & Williamson provided a document which identified global sales, domestic sales, and global income, and they defined it as operating income, and that is before taxes.
Q. And is that consistent with the way you reported the numbers in your report for all companies with

respect to before or after taxes?
MR. BERNICK: Your Honor, I don't believe that that last answer laid a foundation, number one; number two, the question that was just posed is a leading question.
THE COURT: Well it is leading, but I'll allow it. You can answer.
A. All right. The two documents which I examined, I used in my report, they identify operating income, both companies, both Philip Morris and -- and Brown & Williamson, they clearly identify the words "operating income," not "net income," they identified operating income, which is a defined term in Generally Accepted Accounting Principles, and it is before corporate income taxes.
Q. You were also asked some questions about advertising, marketing and promotion expenditures. Do you recall those questions?
A. Yes.
Q. And looking again at Exhibit 26122, which has previously been admitted for illustrative purposes, is this the interrogatory that the plaintiffs sent to the defendants in this case asking information on advertising, marketing or promotion of cigarettes?
A. Yes.

Q. Did this request to the defendants define how to categorize advertising, marketing or promotion of cigarettes?
MR. CORRIGAN: Excuse me, Your Honor, if I might object -- correct me if I'm wrong -- I do not believe such an interrogatory was directed to B.A.T Industries. I'd ask that the question be rephrased.
THE COURT: Okay. Can you specify which defendants received this particular interrogatory?
MS. WALBURN: Sure. I believe, Your Honor, it was the domestic U.S. tobacco companies.
THE COURT: Then you're excluding B.A.T.
MS. WALBURN: I believe that's correct.
THE COURT: All right.
Q. Does this interrogatory define how the defendants should report advertising, marketing and promotion of cigarettes?
A. No. It's up to the companies, the tobacco companies themselves to decide their own definition and respond to the interrogatory.
Q. And what did you do when you received the information in response to this interrogatory from the defendants?

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A. I took it at face value and added up the numbers.

Q. And for RJR, was there a second calculation?
A. Yes. And that was a calculation -- it was a supplemental calculation in which we compared what they reported, because they deducted certain amounts in their definition that they reported to the FTC, and made a supplemental calculation comparing what all the other companies reported versus what was reported to the FTC.
Q. And showing you this pie chart, which has been shown to the jury and the court on previous occasions, can you tell us whether this chart has the higher number for advertising for RJR or the lower number for advertising for RJR?
A. It has the lower number, which is the stated number, not the estimated number. It is the lower stated number for RJR.
Q. And when you say "stated number," it means stated by --
A. It's their number. It's RJR's number.
Q. And finally, Mr. Much, you were asked some questions about research expenditures by the tobacco companies.
A. Yes.
Q. Showing you again interrogatory 18, Exhibit 26124, this was the interrogatory sent to the U.S.

tobacco manufacturers by the plaintiffs requesting information on research related to smoking and health, excluding funds spent on Council for Tobacco Research. Did this question from the plaintiffs define how the defendants should report on the research expenditures?
A. No.
Q. And what did you do when you received the numbers from the tobacco companies?
A. Again, we accepted those numbers at face value and we added up those numbers.
MS. WALBURN: Thank you. I have no further questions.
THE COURT: You may step down.
MR. BERNICK: Your Honor, may I approach at side-bar for a moment?

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(Side-bar discussion as follows:)

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REDIRECT EXAMINATION - PAUL F. MUCH

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(Side-bar discussion concluded.)

THE COURT: As I said, you may step down.
THE WITNESS: Yes, sir. Thank you.
(Witness excused.)
MR. CIRESI: Your Honor, plaintiffs rest pursuant to the previous notification to the court.
THE COURT: All right. Let's take a recess at this time then.
THE CLERK: Court stands in recess.
(Recess taken.)
THE CLERK: All rise. Court is again in session.
(Jury not present.)
THE CLERK: Please be seated.
THE COURT: Here we are.
MR. BLEAKLEY: I guess I'll stand up.
THE COURT: Okay. Someone has to stand up.
MR. BLEAKLEY: I guess we were expecting to be in chambers. Just a little surprised, judge.
THE COURT: Did you want to do this in chambers?
MR. BLEAKLEY: I don't care, Your Honor. Makes no difference, as long as we're here.
THE COURT: Okay, go ahead.
MR. BLEAKLEY: Thank you, Your Honor. The issue that we wanted to raise, as we begin the

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defense case, is that the plaintiffs have said that they were resting provisionally, and as the court knows, the defendants have filed a motion to forbid or to prohibit the plaintiffs from resting provisionally. It is our position, as the court knows, that there is no such procedure under which the plaintiff can rest provisionally. I'm not going to argue that issue. It's been fully briefed to the court. The point is that there are at least two, and perhaps no more than two, motions for directed verdict that one or more of the defendants intend to make, and it is my understanding of the law that a party cannot make a motion for a directed verdict until the other side has closed. And obviously we need to protect the record here and protect our clients' positions.

We do have one and probably two motions for a directed verdict that we're going to file. I believe the defendant B.A.T Industries has one. And then there's a motion that all of the defendants will be jointly filing with respect to the plaintiffs' antitrust claims. But we're a little perplexed as to how to go about this since at this point in time it isn't clear whether the plaintiffs are going to be permitted to rest provisionally.

MR. BERNICK: Your Honor, I would also clarify that BATCo and BATUKE also will have their own motions for directed verdict, but are not proceeding with those motions for the same reasons that Mr. Bleakley has indicated; that is, the plaintiffs haven't actually rested.

THE COURT: Okay. Anything else?

MR. BLEAKLEY: The only other matter that I wanted to -- and I would just as soon raise this at a side-bar. It will take about 10 seconds, if we can.

(Side-bar discussion as follows:)

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(Side-bar discussion concluded.)

THE CLERK: Court stands in recess.

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(Recess taken.)
THE CLERK: All rise. Court is again in session.
(Jury not present.)
THE CLERK: Please be seated.
THE COURT: Counsel.
MR. BLEAKLEY: Thank you, Your Honor. At this time, Your Honor, while defendants will undoubtedly have more motions for directed verdict to be filed at the close of all of the evidence in this case, the defendants move for a directed verdict at this time on the plaintiffs' antitrust claims.
MR. CIRESI: We oppose the motion, Your Honor. Excuse me.
THE COURT: Just a moment. We'll get a chance to hear from everybody that's making a motion.
MR. BERNICK: Reserving the objections that we've made for this procedure of provisional resting, BATCo and BATUKE also move for a directed verdict for failure of proof.
MR. CORRIGAN: Your Honor, as I understand it, plaintiffs have not completed their case in chief. When they do so, B.A.T Industries will make its motion.

THE COURT: You'll make your motion when they --
MR. CORRIGAN: Complete their case.
THE COURT: -- do so? All right. So you have no motion at this time.
MR. CORRIGAN: No, I do not, because plaintiffs have not yet rested completely, Your Honor.
THE COURT: All right. Anything else?
MR. BLEAKLEY: No, Your Honor.
MR. CIRESI: We oppose the motions that have been made, Your Honor.
THE COURT: All right. Anything further?
MR. BERNICK: Yes. The only other issue that I think that was raised in side-bar pertained to the undertaking by Mr. Ciresi to make available his documents on the equitable claims. I believe he said that they were ready for document day right now. What we would propose is we're prepared to proceed with our first witness, but maybe if we could get a list of the exhibits or the documents that Mr. Ciresi would seek to offer with regard to those claims tonight, we can start to take them into consideration as the testimony proceeds.
MR. CIRESI: We will not have them ready

tonight. What we said at side-bar was that if they did not want to proceed with their case and they wanted to put the issues to the court, that we would proceed in that regard.
THE COURT: All right. With respect to the motion for directed verdict regarding the antitrust

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claims, that motion is denied.
I suggest that counsel for plaintiff and defendant meet and confer to see if they can agree on what documents each party will be submitting with respect to equitable claims for the submission to the court.
Okay? Let's proceed.
THE CLERK: All rise.
(Jury enters the courtroom.)
THE CLERK: Please be seated.
THE COURT: Counsel.
MR. BLEAKLEY: Thank you, Your Honor. At this time the defendants call Professor Hyman Berman as our first witness.
(Witness sworn.)
THE CLERK: Please state your name and spell your last name.
THE WITNESS: Hyman Berman, B-e-r-m-a-n.
THE CLERK: Thank you. Please have a seat.

HYMAN BERMAN

called as a witness, being first duly sworn, was examined and testified as follows:

DIRECT EXAMINATION

BY MR. BLEAKLEY:
Q. Good afternoon, Professor Berman.
A. Good afternoon, Mr. Bleakley.
MR. BLEAKLEY: Good afternoon, ladies and gentlemen.
(Collective "Good afternoon.")
Q. Your name is Hyman Berman?
A. That is correct.
Q. And where do you live, Professor Berman?
A. I live in [DELETED]. If you want the exact street address, I'll be happy to give that.
Q. No, that's fine.
What do you do for a living?
A. Pardon me?
Q. What do you do for a living?
A. I'm professor of history at the University of Minnesota.
Q. And as a professor of history at the University of Minnesota, what do you do?
A. I teach. I teach students, undergraduate and

graduate students in history, specifically in 20th century U.S. history, labor history, and Minnesota history. In addition to that I do research of various kinds. And I am also a public historian; that is to say, I translate insofar as possible the latest scholarship for the public at large.
Q. What exactly does a historian do, Professor Berman?
A. It's a very difficult question to answer, but let me try to answer it in -- as -- as succinctly as I can. A historian attempts to go into the past and

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to make it livable and meaningful to the people today.
Q. And why do historians do this?
A. For many, many reasons.
Q. Can you give us some of them.
A. Yes. Some historians do it just out of general curiosity. What happened? How do people live? How did they get along? Some historians are interested in perhaps learning something about the way certain public policy issues were discussed, debated, and finally resolved over time. The expectation of those is that this may help us perhaps have insight into what is happening today, so it would help us in terms of public policy today.

The great Spanish philosopher/historian George Santayana said, "Those who forget history are doomed to repeat the errors of the past." I won't go that far. I'm not going to say that those of us who forget history are going to repeat the errors of the past, but if we don't do history, then certainly we're subject to tripping over the errors of the past, and that's, I think, very important.

Other historians have other reasons. I mean there are historians of society, historians of government, historians of labor, historians of business, historians of the family, and increasingly in recent years we've had historians of women and of different kinds of ethnic groups and things of that nature. So they have different approaches to history. But the sum total of all they're trying to do is to make the past livable for the present.
Q. Is there a term that's used by historians called "historical analysis," Professor Berman?
A. Yes.
Q. And what is that?
A. Historical analysis is the ability to use historical methodology in order to analyze the past. This, of course, requires deep training and significant practice.

Q. Professor Berman, have you come here today to testify and express opinions about the history of public and state awareness of the health risks of smoking and the role that the state has played in public awareness?
A. Yes, I have.
Q. Let's ask you a few questions about your background, Professor Berman. Where are you from originally?
A. I was originally born in New York City of immigrant, working-class parents. I'm the first of my family to go to college and become a professor.
Q. Where did you go to school?
A. I went through the public schools in New York City and was fortunate enough to actually pass an entrance exam to one of the most prestigious public

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high schools in the United States, Stuyvesant High School in New York City. From there I went, like all immigrant kids without any money, to the City College of New York, which was then free, free tuition, free school, free textbooks, everything was free, the only thing that wasn't free was the nickel ride on the trolley car to get there. And the lunch, of course.
Q. Did you graduate from the City College of New York?

A. Yes. But of course there was a hiatus there. I went to City College -- I entered City College in 1942, and in 1943 Uncle Sam asked me to do my duty; in other words, I was drafted into the United States Army during World War II.
Q. How long did you serve in the U.S. Army?
A. I served in the United States Army from September 1943 until March or April 1946.
Q. And when you returned from military service after World War II, did you return to the City College of New York?
A. I did.
Q. And did you receive a degree from the City College of New York?
A. I received a degree in 1948 from the City College of New York.
Q. And what was the degree?
A. It was a bachelor of science in history.
Q. Okay. And after you --
Did you receive any awards or honors while you were in college?
A. Yes, I did.
Q. And what were they?
A. In my junior year, almost immediately after I returned from the Army, I was elected into Phi Beta

Kappa, which is the oldest honorary, scholarly fraternity in the United States, possibly in the world. The following year I was elected to membership in Phi Alpha Theta. Phi Alpha Theta is the honorary history society. I was also awarded a fellowship to do work at City College while I was doing my first year of graduate work in history for the year 1948-'49. I got a fellowship, which I consider a award. That could so be interpreted.
Q. And what did you do as a research fellow?
A. Pardon me?
Q. What did you do as a research fellow? What did --
A. With the fellowship?
Q. What was involved in it?
Yes.
A. Oh, the fellowship was -- it was a fancy word, "fellowship," but really what I was was the what I would call grunge labor; in other words, I graded papers for the -- for professors, and massive amounts of papers like that, mid-quarters and finals. But it

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was good training, excellent training, because it gave me insight into how students think and how they work.

Q. And did you go to graduate school and receive a

graduate degree?

A. Yes, I did.

Q. And what graduate degree did you receive?

A. I received a doctor of philosophy in history.

Q. And what year was that?

A. Pardon me?

Q. What year was that?

A. That was in 1946.

Q. From the Columbia University of New York?

A. From Columbia University of New York, yes, sir.

Q. Now what did it involve for you to become a --
Was this a Ph.D. in history, by the way?

A. Yes, it was.

Q. And what was involved in becoming a Ph.D. or doctor of philosophy in history?

A. There are a number of different stages that one has to go through. The first stage, of course, is to accumulate historical knowledge. That's done through formal class work, through reading. And the test of that is through a written and oral comprehensive examination. Once one does that, one is then formally admitted into candidacy for the doctorate.
The second stage is to choose a topic for research and to do original research, contributing to the sum knowledge -- total sum knowledge of history

in any field. That then is the dissertation. The dissertation is a work, written work which is defended before first of all one's peers; that is, other students and other interested parties, and then finally to a committee of senior faculty members. Having completed that, one receives the doctor of philosophy degree, in this case in history.

Q. Upon receiving your Ph.D. degree, did you begin teaching?

A. Yes.

Q. And where did you begin teaching and what year?

A. My first teaching position after receiving the doctorate was a one-year temporary appointment back in City College of New York where I had completed my undergraduate work, but my first tenure-track teaching position was in Brooklyn College in the next borrough. I taught there for three years and then decided that New York is not a place to raise a family, and went for one year to Michigan State University, and that was the year 1960 and '61. I think I was at Michigan State for less than three months when the call came from the University of Minnesota. And I came here, was interviewed, saw what I saw, liked what I liked, they liked me, and I came.

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Q. And when you were at Brooklyn College, were you teaching history?
A. Yes.
Q. And when you were at Michigan State, you were teaching history?
A. Yes.
Q. And you came to Minnesota in 1961?
A. That's correct.
Q. And have you been teaching at the University of Minnesota ever since 1961?
A. I've been teaching at the University of Minnesota since 1961, with periods of time which I spent as a visiting professor elsewhere.
Q. Where have you been a visiting professor?
A. Most notably I've been a visiting professor at the University of California at Berkeley, which is arguably one of the most prestigious if not the most prestigious schools in the country, public school in the country, with one of the best history departments in the country. I've also been a visiting professor in Asian and European universities. The Asian universities --

Well the European universities were Ludwig Maxamilian Universite, or the University -- University of Munich in Germany, where I was both a

Fullbright professor and a visiting professor in two successive terms -- no, two terms interrupted by one term. I was a visiting professor at the Marie Curie Sklowdowska University in Lublin, Poland, that was for a short period of time, only about -- less than a month. I was a visiting professor at the University of Amsterdam, that was for a term, for full term, and that was in the America Institute there.

In Asia, I was the -- I opened up the American Studies Institute and in Osmania University in Hyderabad, India, in 1964. Sent there by the University of Minnesota on contract with the State Department at that time. In 1981 I was invited and was the first American historian to give a comprehensive course in American history to Chinese scholars who were deprived of knowledge of American history because of the Cultural Revolution, the first one to do that since the opening of relations with the Peoples Republic of China in '79. In 1980 a delegation from the University of Minnesota went to China, and we have a big, big group of -- of -- we have a big interest in China, and the Chinese authorities, educational authorities invited me to come there and I spent a term with them. And the people that I taught were people from all over China.

Subsequent to that I also spent time in China at Beijing University, at Fudan University, at Nankai

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University, and at the -- what I would call the -- the think tank of the Central Committee of the Communist Party of China.
Q. When you held these positions in all of these foreign universities, were you teaching history?
A. Yes.
Q. And was it primarily American history, or were you --
A. It was primarily American -- in fact exclusively American history.
Q. Now when you were teaching at these foreign universities, were you still a professor at the University of Minnesota all that time?
A. Oh, absolutely.
Q. So you've been a professor at the University of Minnesota -- or teacher at the University of Minnesota for almost 37 --
A. Thirty-seven years.
Q. Thirty-seven years.
A. This next September it will be 37 years that I've been at the University of Minnesota.
Q. And what history courses have you taught?
A. I've taught a whole series of history courses,

but the ones that I'm identified with at the university are the 20th century U.S. history courses, which countless thousands of students have gone through that course with me; the American labor history course -- courses, which hundreds of students have gone through with me, and that labor history, I also did the graduate seminar, and a score of graduate students have gotten their doctorates either with me or through me; I've also taught Minnesota history, but that's strictly for undergraduates. I've taught in the past, I've had the occasion to teach -- joint teach a course in world history, and I taught and am going to this next term teach a course in American Jewish history.
I think I've -- that about covers it. There might be one or two other courses that I taught that I don't recall back 25 or 30 years ago.
Q. Have you had occasion during these years to supervise the work of doctoral students?
A. Pardon me?
Q. Have you had occasion during these years to supervise the work of doctoral students; that is, people -- people who are going for their Ph.D's?
A. Yes, I have.
Q. And how many of these have you supervised?

A. I'd say over the years anywhere between --
Well, direct supervisor of the degree, about a dozen; a second supervisor of degree, another eight or 10.
Q. Have any of these doctoral students gone on to become history professors themselves?
A. Yes, they have, and in very prestigious

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institutions. My most -- my best graduate student was my first, and it was, I guess you'd say, downhill from there on, but David Montgomery received a doctorate at the University of Minnesota in the mid-'60s and became a chaired professor in history at Yale University. Others have taught in other institutions: University of Arizona, University of Washington, at the University of Wisconsin.

One of my graduate students is in fact the chief 20th century historian of the Library of Congress, manuscript historian for the Library of Congress. A very prominent position.

Q. Now over the years have you had academic duties at the University of Minnesota other than teaching duties?

A. Yes, I have.

Q. Can you describe some of those, please.

A. Yes. Outside of the normal kinds of academic,

what we call governments duties, member of the senate, member of committees of various departments and colleges and so on, outside of that, for a period of about six or seven years, I was director of the social science program which then was transformed into the experimental courses program of the College of Liberal Arts. That was from about '69 to about '75.

Q. Have you had any written works published?

A. Yes, I have.

Q. Approximately how many?

A. I have one book and about a dozen to two dozen different articles. Many book reviews. And then again which I also consider very, very important in terms of my role as a teacher/scholar, I have in fact been author of and participant in about a dozen different film documentaries. I've also participated in about -- anywhere between 40 and 50 almanac programs dealing with historical interpretations of contemporary policies or contemporary events, depending on a particular issue. So I include that as part of my published work as well.

Q. Have you had written articles published in peer-reviewed publications?

A. Yes, I have.

Q. Have you ever served yourself as a referee or peer reviewer for historical publications?

A. Yes, I have.

Q. And have you authored works other than scholarly works dealing with history?

A. Yes.

Q. Can you give us some examples.

A. For a period of better than a year I was a columnist for the St. Paul Pioneer Press. I also wrote quite a few op ed columns for the Minneapolis Star Tribune. I've written for other newspapers as well which deals with history and public affairs or

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history as it -- as it reflects contemporary policies or contemporary problems.
Q. Now have you done any historical work for television?
A. Yes, I have.
Q. Can you give us a couple of examples.
A. Yes. I think the jury may be familiar with some of my works that I did on Minnesota history. I did a program on Channel 2, KTCA, that was shown on Minnesota Public Television on Minneapolis's past, and I did one on St. Paul's past. I did another program that was done for the Mille Lac Band of Ojibwe Indians with the Woodlands, the history of

their experience. I did a television documentary for KSTP, Channel 5, on Minnesota Pride and Minnesota Prejudice, which dealt with ethnic pride and ethnic prejudice over the years.
I've worked with film makers on such films as Labor's Turning Point, The Truck Strike of 1934, and another one, Children of Labor, and quite a few others as well, but those are the ones that I -- I remember offhand.
Q. Have you ever been a -- or are you a member of any professional associations or organizations?
A. Yes, I am.
Q. Such as? Can you give us a couple?
A. Yes. I am a member of the American Historical Association, which is the major association of historians in the United States. Also been a member -- I'm also a member of the Association of American Historians, which is an association of American historians. I've been a member of the Labor Historians Group, of the Immigration Historians Group, and was a founding member of a group called Historians of American Communism. In fact, I was the founding member and president of that group. The only reason I was president is because I was the only acceptable person to both the left and the right in

that group, the -- the "right" being -- well maybe "right" is a bad way of putting it, but we had FBI and CIA members in that group, and they voted for me.
Q. Have you been involved with any historical organizations?
A. Pardon me?
Q. Have you been involved with any historical organizations in the state of Minnesota?
A. In the state of Minnesota? Yes, I have. For a number of years --
Well I've been a member of the Minnesota Historical Society ever since I came to Minnesota. That's the first thing I did, joined the Minnesota Historical Society. For a number of years, maybe a dozen years or half a dozen years anyway -- I lost track of the number -- I was on the executive board of the Minnesota Historical Society.

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Q. Have you ever testified before in a lawsuit in which your expertise as a historian was brought to bear?
A. Yes, I have.
Q. How many cases have you testified in, do you know?
A. To my recollection, to my knowledge, I've been four -- there were four cases all told.

Q. And in each of those cases you testified as an expert in the area of history?
A. That is correct.
Q. Have you ever testified before for the tobacco industry or any of the defendants in this case?
A. Never.
Q. Now you said you have come here today to testify about the state and public awareness in the area of the health risks of smoking.
A. Yes, sir.
Q. And is the testimony that you are going to give here today based on your education, your training, and your expertise in the area of history and historical analysis?
A. That is correct.
Q. And based on the research that you have done in connection with this case?
A. Yes.
Q. And are the opinions that you are going to give opinions which you have reached to a reasonable degree of historical certainty?
A. Yes.
Q. Let me ask you: What period of time is covered by the testimony that you're going to give here?
A. Well technically the period of time that we're

covering is from the introduction of tobacco as a commodity in the American colonies -- after all, the American colonies or pre-colonies were the ones that introduced tobacco into the world -- until the present. But for all practical purposes, since we're dealing with Minnesota, it's from approximately 1860 to the present.
Q. And your focus has been on the state of Minnesota?
A. Pardon me?
Q. Your focus has been on the state of Minnesota?
A. The focus is on the state of Minnesota, yes.
Q. Okay. Now would you explain for us how you went about conducting the research that you did in this case.
A. The research was conducted in the same manner that I conduct research on any historical project and the same manner that any historian would conduct research on any historical project. The first thing that a historian does in coming to a particular project question is to look at the secondary literature, to examine what in fact had been done

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before, to know what the state of knowledge was in the field. On this particular case there wasn't very much; there was some, but there wasn't very much.

The next thing that one does is to survey what is available in terms of primary sources. Now let me make the distinction here. Reading secondary sources; that is, the literature that already exists, is in fact reading the work of historians or journalists who in fact have used perhaps historical materials to write their books or articles. That is their view of things. That's secondary literature. Primary literature or primary sources are in fact sources generated by the people at the time of the event that one is studying. Thus, primary sources would include, among other things, newspapers, magazines, records of different individuals, manuscripts of different individuals, records of different organizations, manuscripts of different organizations, the specific records of the state legislature, state agencies, executive branch, et cetera, et cetera. Included in this, of course this is another kind of a -- of a topic, also what I would call advocacy groups, the records of different advocacy groups. Advocacy groups are those groups in the society who were advocating one way or another on the issue of tobacco and health. That could include such groups as the Women's Christian Temperance Union, the No Tobacco League, the Anti-Tobacco

League, but it also includes the American Cancer Society, the American Health Association, the Boy Scouts, the Girl Scouts, the YMCA, et cetera, et cetera, et cetera.

In addition to that, I also looked at what was generated at the time of controversy, radio and television materials that were generated at the time. And I was very much interested in how popular culture dealt with the particular issue of smoking and health; thus, I looked at cartoons, both, you know, regular cartoons that you read in the comic strips, or moving cartoons like Walt Disney, stuff like that. Popular music and slang and things of that nature.

So those are the kinds of sources one -- one accumulates over time, and that's the basis upon which one makes one's historical search, one's historical analysis.

Q. Okay. Let me make sure we understand this. So what you're saying is secondary --

A history book, for example, would be secondary literature.

A. Right.

Q. Right?

A. That's correct.

Q. But a newspaper account of an event at the time

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that the event occurred would be a primary source.
A. That is correct. That's how we historians define "primary" and "secondary."
Q. Let me check off some of these that you mentioned. You mentioned newspapers; correct?
A. That's correct.
Q. And that would be primary literature?
A. That would be primary.
Q. Magazines?
A. That would be primary.
Q. Popular culture?
A. Primary.
Q. Radio and television?
A. Primary.
Q. Did you take into account polls that were conducted during --
A. Absolutely.
Q. Is that primary or secondary?
A. That's primary.
Q. Okay. Legislative activities, did you take those into account?
A. Absolutely.
Q. Activities by various agencies and departments of the state of Minnesota?
A. Yes. Both the -- all --

All of the executive branch agencies as well as the officers, the elected officers, the constitutional officers of the executive branch.
Q. And then you mentioned advocacy groups.
A. Advocacy groups, definitely.
Q. And what about schools? What was being taught in the schools, did you take that into account?
A. Most --
Most importantly schools. The Department of Education was, of course, one of the state agencies, but in addition to that one had to look at what the schools in the various parts of Minnesota were doing with -- what in fact was asked -- asked of them to do, so therefore, looking at school materials was also an important primary source.
Q. Okay. Now how did you go about doing this work? How did you find all of these newspaper and magazine articles and all of the other things that you've described here?
A. First of all one must have very, very good and knowledgeable research assistants. One could not by one's self do this kind of massive research. And it was my good fortune to have two first-rate graduate assistants help me, one a historian and the other a political scientist.

I directed them to the various depositories and sources. I myself went to some depositories and sources. The newspapers, the direction I gave on
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newspapers was to photocopy every single article in the major newspapers in Minnesota having to do with smoking and health, including, also, articles -- not only articles, but whatever they found in newspapers, the photocopy -- they photocopied that. We also, for a check, were able to get and were able to -- could go into national newspapers like the New York Times. So the research assistants were critical in doing the kind of work I had to do.

Q. Now is the use of research assistants like the two that you described here, is that common practice for historians when they're doing a historical analysis?

A. Very common practice. Unfortunately, too many historians don't have the financial wherewithal to do the kind of -- to hire the kind of people for the length of time that I did for this -- for this project.

Q. Now did you direct the activities of these research assistants yourselves -- yourself?

A. I direct them very meticulously, very closely.

Q. Now you mentioned the term that I think you

described as "depository sources."

A. Right.

Q. What did you mean by that?

A. By "depository sources," I mean the sources that are in the collections where these sources are held. The state sources are primarily in the Minnesota Historical Society, the legislative sources would be in the Historical Society or the Legislative Reference Library as well. We looked at the materials in the Beal Library at the -- the Biomedical Library at the University of Minnesota, the Wilson Library at the University of Minnesota, the Social Welfare History Archives at the University of Minnesota, the YMC -- YMCA papers at the University of Minnesota. And in the Minnesota Historical Society we went through -- my -- I did and my research assistants did -- whatever was available in terms of archival materials that were there.

Q. What do you mean by "archival materials?"

A. Archival materials are materials that are collected from the participants in a particular activity or event. For instance, the Governor's papers would be in an archive called The Governor's Papers, the Attorney General's papers would be in an archive called The Attorney General's Papers. So

that the archives are in fact the collection of the collective activity, in this particular instance I'm giving an example of, of the state of Minnesota and its various agencies. And the Minnesota Historical Society is the institution that holds these records.

Q. Now when a historian or his or her research assistant is researching newspapers, how does -- how do you go about that?

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A. There are various ways of going about that. The way we did it was we photocopied these articles. My assistants went through them and highlighted some of the articles for me. I separately and independently went through a number and did that as well. Whatever they highlighted that I didn't go through, I went through myself. And consequently we put together what were important and significant articles that were pertinent to the issue that we were -- that we were discussing and that we were researching.
Q. And you said they selected every article that, did you say, mentioned smoking and health?
A. Every article in which smoking and health was in fact the topic or the issue, yes.
Q. Now about how many newspaper articles did you review during the course of your research?
A. Hundreds of thousands.

Q. And how far back in time did you go in reviewing --
Hundreds of thousands or hundreds or thousands?
A. Hundreds of thousands.
Oh, I can't count them. I'd be very happy to take the jury to my study at home, a couple of minutes away from here, to take them up there and show them the boxes and boxes and boxes of material, the filing cabinets of material that we went through. My -- my wife will even make some coffee if you want.
Q. How far back in time did you go in reviewing newspaper articles?
A. In terms of Minnesota materials, we went --
Q. Yes.
A. -- back to the 1870s, the 1880s. We couldn't find too much there, but we tried going back that far.
Q. Now you mentioned magazines as the next of the sources that you researched.
A. Yes.
Q. What magazines did you review?
A. Every conceivable national magazine that existed in the 20th century was checked for articles dealing with the issue of smoking and health.
Q. Can you give examples of the magazines that you

reviewed?
A. Oh, yes, I can give examples. From the early part of the century, such classic magazines as Muncie's Magazine, The Survey, Survey Graphic. Early part of the century, Collier's was a major magazine as well. Later on, magazines such as Liberty, Literary Digest, Time, Life, Fortune, Reader's Digest, Consumer Reports, Cosmopolitan, Good Housekeeping, and many, many others.
Q. Did these magazines and newspapers that you reviewed have a lot of articles that dealt with smoking-and-health issues?
A. Early on not too many, but quite a bit, yes.

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Q. Ah --
A. Cumulatively speaking, quite a bit, yes.
Q. Do you have any idea how many magazine articles you read?
A. Pardon me?
Q. Do you have any idea how many magazine articles you read?
A. I couldn't even estimate, but I would say in the hundreds, maybe thousands.
Q. Now you mentioned popular culture like cartoons. How -- how did you go about doing research on popular culture?

A. That's an interesting question. That's a very, very difficult a topic to really research. There is an association of historians of popular culture, and I'm familiar with some of the folks in that, and I got some assistance from them to some extent. There are some depositories, I say, place -- places that collect popular cultural materials. For instance, television materials are collected by Vanderbilt University, so I can go to Vanderbilt University and help get from them things like that. Cartoons, some of the popular cultural people have cartoons that were very helpful. Some libraries have cartoons that were helpful. Popular music, one could look at Downbeat Magazine and things like that that would give us insight into popular music. Slang from a general reading of the literature, American literature of the 20th century one would pick up slang, from listening to students in the classroom one would pick up slang, from going to the bar one would pick up slang. You know, in other words, it -- I tell the members of the jury, it isn't all sitting in a library. There's some fun involved, too.
Q. Now how who decided what the boundaries were going to be of the research that you did?
A. The boundaries of the research was decided by

me.
Q. And what were those boundaries?
A. The boundaries were essentially to ask the question and to answer the question what, when and how did the people of Minnesota know about the health hazards of smoking, what, when and how did the state, state agencies, know about the health hazards of smoking, and what did they or did they not do about the knowledge that they had, if they had it.
Q. Other than the boundaries that you've just described, were there any limits placed on your research?
A. None whatsoever.
Q. Now perhaps you answered this, and if you did --
A. Pardon me?
Q. -- tell me.
Perhaps you answered this, and if you did, tell me. How did you --

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Where did you go to find out what had been done or what was known by the state of Minnesota and its agencies? What -- what did that research involve?
A. Oh, that was actually going to the legislative records, the legislative records, going to the executive records, but of course insights and hints to that could be seen by reading the newspapers.

After all, reading the newspapers gives you an account of what in fact was going on and how this was going on. Now to get into that, one has to go into the state records as well.
Q. And so did you and your -- you and/or your research assistants actually examine records, for example, of the State Department of Health?
A. Yes, we did.
Q. And the State Department of Education?
A. Yes, we did.
Q. And how did you find -- go about researching the activities of advocacy groups?
A. Well there, of course, it's much easier. Then -- well not much easier, it's about the same. Some of the advocacy groups have left behind records, like the Women's Christian Temperance Union left behind a whole slew of publications and records that do appear in places like the Social Welfare History Archives at the University of Minnesota. The American Cancer Society, American Lung Association, of course, left behind public records, and we were able to get ahold of those.
The No Tobacco League, the Anti-Tobacco League also had records of various kinds. The No Tobacco League, through the university archives, were able to

get a good selection, good chunk of material from the No Tobacco League, which was -- one of the leaders of that was a university faculty member back in the '20s and '30s.
Q. Did you review in the course of your research any materials that were provided to you by defense counsel in this case?
A. I have some, yes.
Q. Can you describe to the best of your memory the materials that were --
A. Yes, I can.
Q. -- provided by defense counsel?
A. The first thing I got from defense counsel was, of course, the complaint and the amended complaint in this particular case. Additionally, after that I received depositions from defense counsel, depositions, if I remember correctly, of Medicaid recipients, and depositions of employees or former employees of the State Department of Health. I did receive a handful of other things that -- but -- but those were the major things.
Q. Did you review -- were any documents --
Your deposition was taken in this case; is that

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right?
A. Pardon me?

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Q. Your sworn deposition was taken in this case; is that correct, by plaintiffs' counsel?
A. A sworn deposition was taken of me in the state in September, yes.
Q. And did you review some documents that were provided to you in the course of that deposition by plaintiffs' counsel?
A. Yes, I have.
Q. And did you review any documents that were -- use the term that we use in this case -- predesignated by plaintiffs' counsel for you from this case?
A. Yes. As a matter of fact that's fresh in my mind. I spent a good number of hours yesterday going through that material. And it was voluminous. Thank you.
MR. CIRESI: You're welcome. We'll ask you about them, professor.
Q. Let me ask you, Professor Berman, do you know approximately how many hours you spent on this research project in coming onto this matter?
A. I don't myself know, but I did check with -- with Ellen Fitzgerald at the University Research Consortium who is keeping records of my time, and she informs me that as of the beginning of March I had

put in approximately 1200 hours in the last two and a half years.
Q. Okay. Now let me ask you this: You did an enormous amount of research here. Why was it necessary for you to see and review so much information to come to the conclusions and the opinions that you're going to give in this case? Why was that necessary?
A. I can answer that question by pointing out to you, sir, that I spent almost the whole term with my graduate seminar answering that question. Historical methodology requires at the very basic minimum comprehensiveness, accuracy, and the absence of present-mindedness.
Q. Okay. Let's take those three --
A. At the very minimum. I'm -- this is at the very minimum.
Q. Let's take those three, three terms,. Accuracy I think speaks for itself. What do you mean --
A. Accuracy and authenticity.
Q. And authenticity.
A. Let me add authenticity to it as well.
Q. What do you mean by "authenticity?"
A. By "authenticity," one has to make sure that what one is reviewing is authentic in the sense that

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it is -- it was generated, developed and created by the person designated, that it is not something outside of the parameters that you're looking at, that it is authentic in that it is not like --

Well an example that the jury may remember just recently, the so-called Marilyn Monroe letters that were -- that turned out to be false in the John F. Kennedy case, that's a case of inauthenticity, of falseness. Now obviously we as historians don't come across that that frequently because we're not into that kind of thing. But that is an example, authenticity.

Accuracy, accuracy is the necessity to make sure that whatever one is going through is in fact in context, accurate in terms of its place in the context of the course of other documents in the course of events. That's -- I'm trying to put it -- put it as succinctly as I can. As I said, I spent almost half a term on this with my graduate students.

Q. Okay. What to you mean by "comprehensiveness?"

A. And comprehensiveness is probably the most important. Comprehensiveness, we mean by that the ability to make sure that you are seeing -- that you have seen everything that is in fact appropriate to the subject matter you're looking at. Now that's

very difficult, very, very difficult, and I want the jury to know this, particularly in the 20th century. The 20th century, and those of us who are 20th century historians, have both been blessed and plagued by this. The plague, there's this flood of paper that has come down upon our heads. Now we are trained and we train ourselves over time to know when enough is enough; otherwise, we'd never finish. This is part of our training and part of our experience as we move on in life. So comprehensiveness is that. It doesn't mean looking at everything, but it means looking at everything that you think is in fact necessary to come to a conclusion regarding any particular question or problem.

Q. Okay. And finally you mentioned the -- I think you called it the avoidance of present-mindedness.

A. That is --

Q. What do you mean by that?

A. That, I think, is very, very difficult again to put across to students. What we historians want to do is put ourselves and therefore our viewers and readers into the position of actually becoming a part of the past. One of the dangers -- and this is a very difficult danger to overcome -- is that we may be writing about or talking about or lecturing about

or giving documentary films about the 1930s, but we live in the 1990s. Trying to put our 1990s sensibilities and ideas and capabilities and views and our points of view, the prejudices and all of

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this kind into the 1930s would be wrong, would be wrong because it would in fact color the past by the present. We try to teach our students to avoid present-mindedness insofar as we possibly can.

Now obviously we can't entirely because we are human beings, we live in the here and now, but we have to be conscious of this all the time. That is something we have to constantly be vigilent about.

Q. Is this sort of like saying hindsight is always 20/20?

A. Pardon me?

Q. Is this --

A. Oh, yeah.

Q. -- sort of like saying hindsight is 20/20?

A. Hindsight is 20/20, exactly.

Q. Now in the course of your research, did you review any tobacco company advertisements?

A. I couldn't help coming across them, after all, since we took photocopies of newspaper articles that dealt with smoking and health, and smoking, obviously newspaper articles that had cigarette advertisements

were also copied.

Q. So you did see some newspapers --

A. I saw them, yes.

Q. Was the review of cigarette advertisements a part of your research as you planned it?

A. Not at all.

Well let me say that not at all, except if in fact I thought it may have a bearing on public perception, which was very little at that one point. I'm not an expert on advertising, I don't know that at all. That is not an area that I'm competent to talk about. But I am as a historian able to tell you that I saw these ads.

Q. Did you review any internal tobacco company documents, any internal documents from the defendants during the course of your research?

A. No. The only internal company documents I reviewed were the ones that were shown me at deposition, and the predesignated documents that I read yesterday.

Q. Now you said that you were here to testify about both public and state awareness. Let's start with public awareness and what you have learned about the public's awareness, and in particular focusing on the state of Minnesota.

A. Uh-huh.

Q. You said you went back a long way in time. Have you divided up your review of the public awareness into time periods?

A. Yes, I have.

Q. How many time periods did you divide it up into?

A. I have divided it up into three time periods.

Q. And would you explain what those three time periods are?

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A. Yes, I will. The first time period I call the -- if you want to call it, for want of a better term, the background period, the period -- it's a long period, it lasted from 1860 to 1950, and it itself would be divided into two periods, pre-World War I and post-World War I. The second period is the transition period from 1950 to 1964. And the third period is the post-1964 period. So the periodization is 1860 to '50, 1950, 1950 to '64, 1964 to whatever.
Q. Now would you explain why it is that you divided your review and your opinions are divided into these three separate time periods?
A. Yes. The background period from 1860 to 1950 set the stage and tone for what in fact was to come after this. It gave -- kind of set the parameters of what in fact the public knew, the issues that were to

be involved, debated, the public policy that was adopted and things of that nature.
The transition period, 1950 to 1964, saw a massive explosion of knowledge and information regarding the specific health hazards of smoking and an increase in the activity both of public dissemination of this on the part of the media and of the state, and in addition to that, increased activity on the part of the state as well in various -- various ways.
Post-1964, 1964, that year is a critical year because that's the year when the first Surgeon General's report was issued, and that changed, I believe, and from what I've seen and read, the fundamental issues that were involved. No longer was there a debate after 1964.
MR. CIRESI: Excuse me, professor. I'm going to object to that. There's no foundation yet for his opinions, Your Honor.
THE COURT: Sustained.
BY MR. BLEAKLEY:
Q. All right. Let's -- we'll come back to that later, professor.
You said the first period that you reviewed was the period prior to 1950, from about 1860 I think you

said?
A. Well actually I -- I -- I started with -- with Christopher Columbus.
Q. Well I'm going to say, you did --
A. Yeah.
Q. You did --
A. Why don't we start at the beginning.
Q. You did earlier say that you went back to the beginning --
A. Yes.
Q. -- of tobacco; is that right?
A. But as far as Minnesota is concerned, Christopher Columbus had nothing to do with Minnesota, despite what patriotic Minnesotans would

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want to believe.
Q. Well let's talk about Christopher Columbus just for a moment.
A. Sure.
Q. What did you learn about Christopher Columbus that has anything to do with tobacco and the health hazards of smoking?
A. Well when Christopher Columbus came to Santo Domingo --
MR. CIRESI: Excuse me.
THE WITNESS: Sorry, sorry.

MR. CIRESI: Objection, Your Honor, it's irrelevant.
THE COURT: What Christopher Columbus did?
MR. CIRESI: Yes.
THE COURT: None of us Minnesotans would be here without him.
(Laughter.)
MR. CIRESI: Being of Italian ancestry, Your Honor, I'd love to hear all about Christopher Columbus, but -- sorry.
MR. BLEAKLEY: Your Honor --
THE COURT: Go head, so long as we don't get carried away.
THE WITNESS: I'll keep it simple.
THE COURT: All right.
MR. BLEAKLEY: It won't be long, Your Honor.
THE WITNESS: I'll keep it simple.
MR. BLEAKLEY: But I would remind the court that Professor Hurt was allowed to give his version of the history of tobacco, and I think we ought to be given a few minutes.
THE COURT: But I gave Professor Hurt the same caution.
MR. BLEAKLEY: Taken.

THE WITNESS: Thank you. Thank you, Your Honor.
MR. BLEAKLEY: The caution is taken.
THE COURT: All right.
MR. BLEAKLEY: I think you've gotten the caution from the court.
THE WITNESS: I got the caution.
MR. BLEAKLEY: Brief with Christopher Columbus.
A. The answer very simply is Christopher Columbus on his second voyage to Santo Domingo came across, in fact, the use of tobacco by both natives and his own force --
(Document displayed on screens.)
MR. BLEAKLEY: I'm sorry, take it down for a second.
Q. Go ahead.
A. -- and commented regarding that, which comment was, of course, picked up by -- by -- by Bartolome de

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las Casas, a Dominican pryor who was a very important figure in Spanish colonization of New World and was in fact a contemporary of Columbus. Bartolome de las Casas wrote this comment in his History of the Indies, which we used in our research.
Q. Would you turn to tab one of your book,

please, --
A. I certainly will.
Q. -- Professor Berman.
MR. CIRESI: May we have an exhibit number, counsel?
MR. BLEAKLEY: I'm sorry, it's demonstrative Exhibit 252 -- X2527.
A. Yes, sir.
Q. As what is demonstrative Exhibit X2527?
A. This is a demonstrative of that quote from Bartolome de las Casas, Historia de las Indias, of Christopher Columbus regarding tobacco.
Q. Now in your research did you find this quote from Christopher Columbus's diaries yourself, or you or your research assistants?
A. Oh, yes, we found it.
Q. And where did you find it?
A. In fact -- in fact this quote I used in the survey course of American history over time. It's not something that was --
In fact I knew of this quote before I started on this project.
MR. BLEAKLEY: Your Honor, at this time we move the admission of demonstrative Exhibit X2527 for illustrative purposes only.

MR. CIRESI: Objection, Your Honor, it's not complete, number one; number two, it was designated in Spanish. This appears to be an excerpt of part of it and translated into English. There's no foundation.
THE COURT: Do you have a complete copy in English?
MR. BLEAKLEY: A complete copy of the diaries?
THE COURT: Okay. Unless we could poll the jury to see how many understand Spanish.
THE WITNESS: Anybody speak Spanish?
THE COURT: Well I do somewhat, but I'm not going to translate it. We don't -- we don't have a complete copy here?
MR. BLEAKLEY: The complete copy --
The only complete copy is in Spanish, Your Honor. This was -- this passage was translated into English. I seriously question whether there's any dispute about the accuracy of this quote. It has appeared in --
MR. CIRESI: The issue isn't whether there's a dispute about the accuracy this selected quote, the issue is what else is in this document.

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And it was designated in Spanish. That's our

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objection. And this is an excerpt of part of that document and now it has been translated into English, two sentences.

THE COURT: Okay. I'm going to allow it, then maybe Mr. Berman can provide us with a translated copy.

THE WITNESS: I don't believe so.

THE COURT: You don't?

THE WITNESS: I could check the library and see if there is one.

THE COURT: I guess our concern is is there something else in that it says what I said here really wasn't true or anything like that.

THE WITNESS: I -- I -- I'll check it out.

THE COURT: Okay. All right. I'm going to allow it.

THE WITNESS: It's very possible that there is a translated --

THE COURT: I don't really want to spend too much time and Christopher Columbus. Let's move on.

THE WITNESS: Fortunately I could read a little Spanish, though. Like you, Your Honor.

MR. BLEAKLEY: So may I refer to Exhibit X2527?

THE COURT: You may.

MR. BLEAKLEY: Thank you, Your Honor.

BY MR. BLEAKLEY:

Q. The quote from Columbus's diaries, "I knew Spaniards (he adds) on this island of Espanola (San Domingo) who were accustomed to take it, and being reprimanded by telling them it was a vice, they made reply that they were unable to cease from using it. I know not what relish or benefit they found therein."

What significance does this have to the historical research that you did and the opinions that you're going to give in this case?

A. This shows me that as early as the late 1400s, the 1490s, Christopher Columbus found that the usage of tobacco was in fact difficult to break, that he had difficulty getting the people to stop using it, and what they -- benefits they got from it he didn't know.

Q. Now tobacco --

MR. CIRESI: Excuse me, Your Honor, I'm going to move to strike. There's no foundation for that.

THE COURT: I'm going to let it stand. Let's move on.

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BY MR. BLEAKLEY:
Q. Now tobacco was originally found in the New World; is that right?
A. That is correct.
Q. And was it taken to Europe?
A. Yes, it was.
Q. And when tobacco was taken to Europe, back in these old days, were there people who were concerned about the health risks of smoking in Europe?
MR. CIRESI: Your Honor, we're moving into new areas now, and I'm going to object to that as being leading.
THE COURT: Okay. It is leading.
BY MR. BLEAKLEY:
Q. Would you turn to tab three, Professor Berman.
A. Uh-huh.
Q. Can you describe what --
MR. CIRESI: May we have an exhibit number?
MR. BLEAKLEY: I'm sorry. GA000002.
Q. Can you explain what this is?
A. Yes. This is A Counter-Blaste to Tobacco written by James I of England in 1604. James I then was King of England.
MR. BLEAKLEY: Your Honor, we move the admission of Exhibit GA000002.

MR. CIRESI: No objection, Your Honor.
THE COURT: All right. The court will receive 000002.
BY MR. BLEAKLEY:
Q. And what do you mean when you say that King James wrote A Counter-Blaste to Tobacco, what -- what was -- what was this all about?
A. That's a very interesting question, because remember that tobacco became a major commodity in the English colonial trade. In fact it was the commodity that saved Virginia from economic extinction. Yet the King of England, who in fact depended in large part upon the success of a colony like Virginia, felt compelled to write this counter-blaste on tobacco because he felt -- felt very strongly about it.
To be sure, he initially wrote it without signing his name, incognito, but later on it became clear that he was the one, and he admitted he was the one who wrote it.
Q. Would you turn your attention to the document at tab two, which is Exhibit -- demonstrative Exhibit X1988.
A. Yes, sir.
Q. Is this a quotation from King James' Counter-Blaste to Tobacco?

A. Yes, it is.
MR. BLEAKLEY: Your Honor, we move the admission of demonstrative Exhibit X1988.
THE COURT: Counsel, you referred to tab two. That doesn't sound right.

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MR. BLEAKLEY: It's tab two in my book. Have we put it in the wrong place in your book?
THE COURT: Okay. No, I've got it here.
MR. BLEAKLEY: Okay. Sorry.
THE COURT: Thank you.
MR. CIRESI: Is duplicative. Is this for illustrative, or what --
MR. BLEAKLEY: This is for illustrative purposes only. Sorry.
THE COURT: All right. We'll receive it for illustrative purposes.
BY MR. BLEAKLEY:
Q. "Tobacco is a custom loathsome to the eye, hateful to the nose, harmful to the brain, and dangerous to the lungs." This came from King James' Counter-Blaste?
A. It came from King James' Counter-Blaste to Tobacco and is a very famous quote.
Q. Has it --
A. So much so that in fact it was repeated in the

preface to the Surgeon General's report of 1964.
Q. Now you said that tobacco played an important role in American colonial days; is that right?
A. It did.
Q. Were concerns expressed about the health risks of and the use of tobacco in colonial days in the United States?
MR. CIRESI: Your Honor, again I'm going to object to the leading nature of the questions in this area.
THE COURT: It is leading, counsel.
MR. BLEAKLEY: May we approach the bench, Your Honor?

(Side-bar discussion as follows:)

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(Side-bar discussion concluded.)

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BY MR. BLEAKLEY:
Q. Could you turn to tab four, Professor Berman.
A. Uh-huh.
Q. Which is --
A. Yes, sir.
MR. CIRESI: May we have an exhibit number?
MR. BLEAKLEY: Which is exhibit LA100021.
Q. Do you have that before you, Professor Berman?
A. I do have it in front of me.
Q. What is Exhibit LA100021?
A. It is a letter written by John Quincy Adams to the Reverend Dr. Samuel Cox of Brooklyn, New York, dated Massachusetts 19th of August, 1840.
Q. And is this letter, Exhibit LA100021, a document that you or your research assistants --
A. Yes.
Q. -- found during course of your research?
Wait for me to finish my question.
A. Yes, it is.
MR. BLEAKLEY: Your Honor, we move the

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admission of LA100021.
MR. CIRESI: Do we have a basis, Your Honor? I still don't have a foundation here.
THE COURT: I wonder if you could lay some -- seek certainly some relevancy foundation.

MR. BLEAKLEY: Okay. Certainly, Your Honor.
BY MR. BLEAKLEY:
Q. Is this a document that you considered in the course of your research in the development of the opinions that you're expressing here today?
A. Yes, it is.
Q. Does it have any significance to the awareness of the state of Minnesota and the people of Minnesota about the health hazards of smoking?
A. Yes, it does.
MR. BLEAKLEY: We move the admission of the exhibit, Your Honor.
MR. CIRESI: Objection, relevance.
THE COURT: All right. Court will receive LA100021.
BY MR. BLEAKLEY:
Q. Now you said that this was a letter from John Quincy Adams to a Dr. Cox; correct?
A. That's correct.
Q. And who is John Quincy Adams?
A. John Quincy Adams was the former President of the United States. In 1840 -- in 1840 he was then a member of Congress, and many people in the audience here and members of the jury may be familiar with

John Quincy Adams from seeing the movie Amistad. He was the attorney for the mutineers in that film.
Q. This letter was written in 1890; is that correct?
A. 1840.
Q. I mean 1840. Excuse me.
A. Oh, 1890 -- by 1890 he was long dead.
Q. Pardon me. 1840.
A. Yes.
Q. Can we focus on the portion that is highlighted in yellow. And this reads, "In my early youth I was addicted to the use of tobacco in two of its mysteries, smoking and chewing. I was warned by a medical friend of the pernicious operation of this habit upon the stomach and the nerves...."
Of what significance does this document have to the opinions that you have in this case?
A. It shows that -- that former President Adams believed, one, that -- that even though he was into the mysteries of smoking and chewing, he was actually addicted to it, he said, but he was warned by his friend, friend -- I think it's significant who the friend was.
Q. Who was the friend?
A. The friend was Dr. Benjamin Rush, who was a

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medical practitioner and a signer of the Declaration of Independence and a major figure in Revolutionary times. Dr. Benjamin Rush wasn't the only one that made that kind of comment at the time, but he was the only medical authority that I was able to find that made such kind of comment.

Q. Let me ask you a question: What kind of tobacco products were Americans using during this period of time?

A. Primarily Americans were smoking pipes and were -- snuff, using snuff.

Q. When did cigarettes become popular?

A. Cigarettes didn't become popular in the United States until the 1880s.

Q. And --

A. They were introduced into the United States about the time of the Civil War, after the 1850s or '60s.

Q. And what caused cigarettes to become popular in the United States?

A. A number of different factors, both what I would call socioeconomic factors and technological factors. The socioeconomic factors were the rise of cities, industrialization, immigration, the expansion of factories. This made, then, cigarette smoking much

more accessible for people with short time spans. Smoke a cigar, smoke a pipe, took time, leisure; one had to have a luxury for that. One could smoke a cigarette very quickly.

The technological was, of course, the development of the cigarette rolling machine and the development of the safety match. These two technological innovations, one, made it possible to mass produce cigarettes, and two, made it safe to ignite cigarettes.

Q. Did cigarettes continue to rise in popularity in the United States?

A. Yes, it did.

Q. Did World War II play any role in the popularity of cigarettes?

A. World War II played a very significant role in the popularity of cigarettes.

Q. And why is that?

A. Again, what we had is the mass development of an Army, both a conscripted and a volunteer Army that went to France, and in the foxholes -- not foxholes, in the trenches -- foxholes, wrong war, sorry about that. In the trenches of France during World War I it was possible to smoke a quick cigarette, not a cigar or a pipe. Cigarettes became so popular among

the Army that in fact even advocacy groups that were

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opposed to cigarette smoking, like the Salvation Army, Young Women's Christian Association, were in fact obligated by patriotism to distribute cigarettes to the soldiers in France and in the United States as well.
Q. During this period, that is, the early 20th century, World War I, were there advocacy groups who were against smoking?
A. Oh, yes. Quite a few.
Q. Were any of these advocacy groups located in the state of Minnesota?
A. Yes.
Q. Were any of these advocacy groups concerned about the potential health risks of smoking?
A. They all were.
Q. Turn to tab six in your exhibit book, --
A. Uh-huh.
Q. -- if you would.
THE COURT: Counsel, maybe we should recess at this time.
MR. BLEAKLEY: Sure. I didn't realize it was that late.
THE COURT: Okay. We'll recess, reconvene tomorrow morning at 9:30.

THE CLERK: Court stands in recess, to reconvene tomorrow morning at 9:30.
(Recess taken.)

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